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No. ____
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IN THE

Supreme Court of the United States

J. B. PARKER,

Petitioner,

—v.—

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

1. Is *Cabana v. Bullock*, 474 U.S. 37 (1986), irreconcilable with *Ring v. Arizona*, 536 U.S. 584 (2003), such that the Court should overrule *Cabana* and hold that the Sixth Amendment requires that a jury – rather than a judge – decide whether the heightened *mens rea* requirements of *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1986), have been met in a felony murder capital conviction?

2. After defendant has invoked his right to counsel pursuant to the Fifth and Sixth Amendments, do *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Michigan v. Jackson*, 475 U.S. 625 (1986), permit the State to establish defendant's initiation of a custodial interview outside the presence of counsel solely through evidence of the defendant's intentions prior to the invocation of his right to counsel?

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PETITION FOR A WRIT OF CERTIORARI

J.B. Parker respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida.

OPINION BELOW

The opinion of the Supreme Court of Florida (Pet. App., *infra*, 1a) is reported at 873 So. 2d 270 (Fla. 2004) ("*Parker VI*").

JURISDICTION

The judgment to be reviewed was entered by the Supreme Court of Florida on January 12, 2004. The Supreme Court of Florida denied Parker's motion for rehearing on April 28, 2004 (Pet. App. 40a). This Court has jurisdiction pursuant to 28 U.S.C. § 1257 and Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Section 921.141 of the Florida statutes is reproduced in the Appendix. (Pet. App. 81a).

STATEMENT OF THE CASE

A. The Facts Underlying Parker's Conviction and Sentence

Parker was convicted of the 1982 murder, kidnapping and robbery of Frances Julia Slater. Three other individuals were involved in and charged with these crimes. The victim, a convenience store clerk, had been robbed at gunpoint, abducted, driven to a remote location, and killed. The murder weapon was never recovered and, other than the statements of the four defendants, there was little evidence to establish the roles each took in the commission of these crimes. At the four separate trials of these defendants, the State urged that three of the four, including Parker, were the triggerman (although it was indisputable that the crime involved only a single firearm and a single shot).

Parker was the third of the four defendants to be tried. In January 1983, the jury recommended that a sentence of death be imposed. The trial judge accepted the jury recommendation and imposed a sentence of death that was affirmed on appeal. *Parker v. State*, 476 So. 2d 134 (Fla. 1985) ("*Parker I*").

As to the other three defendants, the State obtained guilty verdicts on the charge of first degree murder against all three. Two of the other defendants were also sentenced to death. The other defendant, Terry Wayne Johnson, received a life sentence after the trial court concluded that – because, as a matter of law, the proof against him could only support a guilty verdict based on felony murder grounds and the evidence of his intent did not meet the culpability standards

of *Enmund v. Florida*, 458 U.S. 782 (1982) — Johnson was not eligible for the death penalty.[1]

In subsequent proceedings involving Parker, the Eleventh Circuit had occasion to evaluate the evidence against Parker and characterized that evidence, other than his own statements, as "not great":

> The other evidence linking Parker to the murder was not great. No weapon with Parker's fingerprints was introduced. One witness identified Parker as being in the store earlier in the evening of the murder. Another witness testified that he saw the four defendants together in Fort Pierce earlier in the year. And one witness testified that he saw Parker's co-defendant Bush (along with unidentified others) in the store at the time of the robbery.

Parker v. Singletary, 974 F. 2d 1562, 1576 (11th Cir. 1992) (footnotes omitted) ("*Parker IV*") (Pet. App. 67a). And, as to Parker's statements, the Eleventh Circuit found the first (the "May 5 Statement") to be inadmissible as a violation of Parker's Fifth Amendment right to counsel, *id.* at 1574, and the second (the "May 7 Statement") to "focus[ ] almost exclusively on the events after the murder" with "no details of the events leading up to and during the murder." *Id.* at 1575-76. The Eleventh Circuit assigned no weight to Parker's alleged third statement – which consists of the

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[1] One of the defendants, John Earl Bush, has since been executed. Another defendant, Alphonso Cave, ultimately obtained two re-sentencing proceedings, and received a death sentence both times. At the first of these re-sentencing proceedings, the State submitted previously undisclosed evidence that Cave had confessed to shooting the victim. At that proceeding, the State contended that it had therefore established, beyond a reasonable doubt, that Cave was the shooter. Cave remains on death row.

testimony of a co-defendant's girlfriend that Parker allegedly admitted shooting the victim – in assessing the impact on the jury of the wrongful admission of the May 5 Statement. *Id.* at 1576.

B. The Proceedings Leading to the Vacatur of Parker's Initial Death Sentence

Following state court collateral review proceedings, *see Parker v. State*, 542 So. 2d 356 (Fla. 1989) ("*Parker II*") and *Parker v. State*, 550 So. 2d 459 (Fla. 1989) ("*Parker III*"), Parker filed a petition for a writ of habeas corpus in federal court. In 1992, the Eleventh Circuit affirmed the denial of Parker's federal habeas corpus petition. *Parker IV*. While his motion for rehearing was pending in the Eleventh Circuit, Parker learned that the State had withheld material evidence. Parker thereafter obtained a stay of further proceedings in the Eleventh Circuit pending an application to the state courts for vacatur of the judgment and sentence based on newly discovered evidence.

The trial court ordered a vacatur of Parker's sentence on grounds that the State had wrongfully suppressed material evidence favorable to the defense, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); the Supreme Court of Florida affirmed. *State v. Parker*, 721 So. 2d 1147 (Fla. 1998) ("*Parker V*"). The Supreme Court of Florida rejected Parker's cross-appeal, however, and affirmed the trial court's determination not to vacate Parker's conviction, joining the trial court in holding that even though the improperly suppressed evidence was material to a conviction for premeditated murder, it was not material to a conviction on felony murder grounds. *Parker V*, 721 So. 2d at 1152.[2]

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[2] In doing so, the Supreme Court of Florida held, as had the Eleventh Circuit previously, *see Parker IV*, 974 F.2d at 1576, that the guilty verdict was sustainable on felony murder grounds alone. *Parker V*, 721 So. 2d at 1152 (Pet. App. 67a).

C. The Re-Sentencing Proceedings

In October 2000, a new sentencing hearing was held pursuant to the provisions of Fla. Stat. § 921.141. By a vote of 11 to 1, the jury recommended a sentence of death. The trial court subsequently entered the requisite findings in support of its judgment that Parker be sentenced to death.

Prior to the October 2000 re-sentencing hearing, Parker moved to suppress the custodial May 7 Statement. The trial court initially did not address the suppression motion on the merits but instead granted the State's motion to quash Parker's motion on the ground that the previous denial of Parker's motion to suppress at his original trial could not be re-litigated. On appeal, the Supreme Court of Florida remanded to the trial court to conduct a hearing on Parker's motion to suppress. (Pet. App. 87a).[3]

On remand to the re-sentencing court, Parker challenged the admissibility of his May 7 Statement on Fifth and Sixth Amendment grounds and Parker and the State submitted the motion to suppress on a stipulated factual record. The facts and circumstances leading to the May 7 Statement, and therefore the assessment of the admissibility of that statement, are inextricably bound up with the events surrounding Parker's previous custodial statement made on May 5 (the "May 5 Statement").

Because the Eleventh Circuit had previously held that Parker effectively invoked his right to counsel during his custodial interrogation on May 5 and had not been provided the counsel to which he was constitutionally entitled,[4] *Parker*

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[3] The Supreme Court of Florida ultimately rejected the State's claim that Parker was barred from litigating the admissibility of the May 7 Statement at his October 2000 re-sentencing hearing. *Parker VI*, 873 So. 2d at 279 (Pet. App. 9a).

[4] The Eleventh Circuit nonetheless held this error to be harmless. *Parker IV*, 974 F.2d at 1576 (Pet. App. 62a).

IV, 974 F.2d at 1574 (Pet. App. 62a), the critical question before the re-sentencing court, for purposes of determining the admissibility of the May 7 Statement, was whether Parker, still not having the counsel to which he was entitled present during the May 7 custodial interrogation, had initiated this second contact with the police. According to the stipulated record submitted to the trial court, the detective who conducted the May 7 interview had been requested, apparently by the sheriff, to meet with Parker, but had no personal knowledge of whether Parker had at any time subsequent to the May 5 interrogation asked to speak with law enforcement. He could only testify that someone had told him that at some unspecified time Parker "had contacted someone at the Sheriff's department and indicated that he wished to cooperate in the investigation." (Pet. App. 89a). Although the detective believed that the person who made this statement to him was the sheriff, the only evidence from the sheriff was that he did *not* believe that he had spoken with Parker at any time after the May 5 interrogation. (Pet. App. 92a). In addition, Parker denied that he had asked to speak with law enforcement on May 7. (Pet. App. 94a). Notwithstanding the absence of *any* evidence, therefore, that Parker had initiated the May 7 interview, the trial court denied the motion to suppress.

D. The Decision of the Supreme Court of Florida on Appeal from the Re-Sentencing Determination

The Supreme Court of Florida affirmed the judgment of the re-sentencing court on January 22, 2004. (Pet. App. 1a). The court rejected Parker's challenge to the admissibility of his May 7 Statement pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Michigan v. Jackson*, 475 U.S. 625 (1986), despite the lack of *any* evidence of an affirmative act or other evidence of initiation that occurred after Parker's May 5 invocation of the right to counsel. The Supreme Court of Florida relied exclusively on 1) evidence of Parker's pre-rights invocation intent at the time he met

with the sheriff on May 5, and 2) the hearsay testimony of the detective who interrogated Parker on May 7, even though the detective in fact had no knowledge or evidence tending to show that Parker indicated a wish to cooperate at any time after his May 5 invocation of the right to counsel (and the Sheriff had disclaimed speaking to Parker after the May 5 interrogation). *Parker VI*, 873 So. 2d at 280-81 (Pet. App. 12a-13a).

In addition, the Supreme Court of Florida rejected Parker's claim that the Florida death sentencing statute violates *Ring v. Arizona,* 536 U.S. 584 (2002). It did so on the ground that because the jury at his original trial had found Parker guilty of robbery and kidnapping, Parker had received the constitutionally mandated jury determination that an aggravating factor was present (*i.e.*, that the murder was committed in the course of a robbery or kidnapping).[5] *Parker VI*, 873 So. 2d at 294 (Pet. App. 39a). In reaching this conclusion, the Supreme Court of Florida did not address the requirement that an aggravating factor "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The Supreme Court of Florida also ignored the fact that Parker, although convicted of felony murder,[6] never received a jury

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[5] Under the Florida death penalty statute, the aggravating circumstances include:

> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery . . . [or] kidnapping . . . .

Fla. Stat. § 921.141(5)(d).

[6] Although Parker was charged with premeditated and felony murder, and the jury verdict simply found Parker guilty of first

determination at the guilt/innocence phase of the original trial that the heightened *mens rea* requirements for imposition of a death penalty in felony murder cases established in *Enmund* and *Tison v. Arizona*, 481 U.S. 137 (1987), had been met.

REASONS FOR GRANTING THE PETITION

A. The Court Should Grant the Petition to Address the Application of *Ring* to Imposition of the Death Penalty in Felony Murder Cases and the Continued Validity of *Cabana v. Bullock*

1. Summary of Reasons for Granting the Petition

The decision below is in accord with *Cabana v. Bullock*, 474 U.S. 376 (1986), but in sharp conflict with this Court's 2003 decision in *Ring* and its recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). Indeed, *Cabana* is irreconcilable with *Ring* and *Blakey*. In *Cabana*, this Court held that it is permissible under the Sixth Amendment for a court, rather than a jury, to determine whether the heightened *mens rea* requirements for the imposition of a death sentence in felony murder cases, established in *Enmund* and *Tison*, have been met as a matter of fact. By contrast, in *Ring* this Court held that it was *not* permissible under the Sixth Amendment for a court, rather than a jury, to determine whether a statutorily required aggravating factor for imposition of a death sentence is present. *Ring*, 536 U.S. at 585. Although the continued viability of *Cabana* in light of *Ring* has yet to be the subject of a split among the highest courts of the states that authorize a death sentence for felony murder convictions, it has been the subject of conflicting decisions by two lower courts. *Compare Palmer v. Clarke*, 293 F. Supp. 2d 1011 (D. Neb.

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degree murder without specifying which grounds, as discussed below, the guilty verdict, as ultimately upheld by the Eleventh Circuit and the Supreme Court of Florida, is sustainable solely on felony murder grounds.

2003) (finding that Cabana is no longer viable in light of *Ring*) with *Brown v. State*, 67 P. 3d 917 (Ok. Crim. App. 2003) (rejecting defendant's claim that *Ring* implicitly overruled *Cabana*). The continued vitality of *Cabana* in light of the Court's subsequent decision in *Ring* is a question squarely presented by this petition and one requiring this Court's urgent attention. This case is an appropriate opportunity for this Court to address this important issue affecting the application of the death penalty in all states, such as Florida, that permit the death penalty in felony murder cases.

2. Argument

Parker was charged with first degree murder. Because the murder occurred during the commission of a felony, the jury was instructed at Parker's initial trial that it could find Parker guilty of first degree murder either on grounds of premeditated murder or felony murder. In rendering its January 1983 verdict of guilty, the jury did not specify the basis for its first degree murder verdict.

When the Eleventh Circuit addressed the impact of the admission of Parker's May 5 Statement in violation of his Fifth Amendment rights to counsel, however, that court held the remaining evidence sufficient to support Parker's conviction under a felony murder theory and the constitutional error harmless. 974 F.2d at 1576. Similarly, when the Supreme Court of Florida subsequently determined that the *Brady* violation that led to vacatur of Parker's original death sentence was not grounds for vacating Parker's murder conviction, it concluded that the improperly suppressed evidence was not material to Parker's conviction because it "goes only to a determination regarding premeditated murder" and there was sufficient evidence of Parker's guilt of felony murder to sustain the conviction. *Parker V*, 721 So. 2d at 1152.

The Eleventh Circuit and Supreme Court of Florida, therefore, held that Parker's conviction of first degree murder is sustainable solely on grounds of felony murder. For a death sentence to be imposed on a defendant found guilty of felony murder, however, the defendant must be a "major participant" in the underlying felonies (here armed robbery and kidnapping) that led to the victim's death, and must have exhibited a "reckless disregard for human life." *Tison*, 481 U.S. at 156-57; *Enmund*, 458 at 783. Because the jury at the guilt/innocence phase of Parker's original trial made no such findings of these heightened *mens rea* requirements established in *Tison* and *Enmund*, *Ring* and *Blakely*, would seem to require that the conditions to an increase in Parker's maximum sentence mandated by *Enmund* and *Tison* must, pursuant to the Sixth Amendment, be determined by the jury, not the court. The only finding that the *Enmund* and *Tison* criteria had been met in Parker's case, however, was made by the Supreme Court of Florida in connection with its 1998 affirmance of the trial court's order granting a new penalty phase proceeding. *Parker V*, 721 So. 2d at 1151.

We recognize that in *Cabana* this Court held that appellate courts may, consistent with the requirements of the Constitution, make the required *Enmund* findings in capital felony murder cases. 474 U.S. at 391. As explained in this Court's subsequent opinion in *Walton v. Arizona*, 497 U.S. 639, 648-49 (1990), *Cabana* had held that a jury determination of the heightened *mens rea* requirements of *Enmund* was not required on the ground that it did not involve an "element of a crime of capital murder," it "only place[d] a 'substantive limitation on sentencing.'" *Id.* at 649 (citations omitted); *see Ring*, 536 U.S. at 599.

However, this basis for distinguishing between facts that can, consistent with the Sixth Amendment, be found by a judge, and those that require a jury determination, was expressly rejected by this Court's subsequent opinions in *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000), *Ring*

(which expressly overruled *Walton*, 536 U.S. at 609), and *Blakely*. Pursuant to *Apprendi*, *Ring* and *Blakely*, the relevant inquiry is not whether a factor that could lead to a greater sentence is denominated a "sentencing factor" or an "element of the offense," but rather whether the increase in punishment is conditioned upon the existence of the factor. *See Ring*, 536 U.S. at 604-05 (citations omitted) ("*Apprendi* repeatedly instructs . . . that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury"); *see also Blakely*, 124 S. Ct. at 2537-38. The holding in *Ring* that the aggravating factors enumerated in the Arizona death penalty statute "operate as 'the functional equivalent of an element of a greater offense,'" thereby mandating under the Sixth Amendment that they be found by a jury (536 U.S. at 609, quoting *Apprendi*, 530 U.S. at 494 & n. 19), is fully applicable to Florida's statute as applied to Parker. There is no meaningful distinction between the aggravating factors at issue under the Arizona death penalty statute, the existence of which render a person convicted of first degree murder eligible for the death penalty, and the heightened *mens rea* requirements of *Tison* and *Enmund*.

Ring cannot be distinguished on the ground that the *Enmund* and *Tison* factors are constitutionally mandated, and therefore "court-imposed," and not a creation of the State legislature. As this Court observed in *Ring*:

> In various settings, we have interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope. . . . If a legislature responded to one of these decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. We see no reason to differentiate capital crimes from all others in this regard.

536 U.S. at 606-07 (citations omitted).

As this Court recognized in *Enmund* and *Tison*, in states such as Florida where one can be found guilty of felony murder on the basis of having aided and abetted the commission of a felony during the course of which a murder is committed, a conviction for felony murder, standing alone, does not establish the degree of culpability required under the Eighth Amendment for imposition of a sentence of death. *Tison*, 481 U.S. at 156; *Enmund*, 458 U.S. at 798. To permit the imposition of a sentence of death based on the culpability of the other participants in the felony and murder, as this Court explained in *Enmund*, would impermissibly deprive a capital defendant guilty of felony murder of the individualized consideration of his culpability mandated by the Eighth Amendment. *Enmund*, 458 U.S. at 798 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)); *see also Tison*, 481 U.S. at 146-49.

The heightened *mens rea* requirements of *Enmund* and *Tison* serve a purpose virtually identical to that served by the aggravating factors at issue in *Ring* – they identify those eligible for the death penalty. Aggravating factors are legitimately part of the death penalty scheme only if they "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 802, 877 (1983). As the heightened *mens rea* requirements of *Enmund* and *Tison* serve the same function as the aggravating factors at issue in *Ring* (*i.e.*, they narrow the class of those eligible for the death penalty), there is no principled basis on which to hold that a jury is to determine the existence of an aggravating factor, as mandated by *Ring*, but that a judge is permitted to determine the presence of the heightened *mens rea* requirements of *Enmund* and *Tison*, as this Court held in *Cabana*. In light of *Ring*, therefore, *Cabana* can no longer stand. *See generally* B. Stevenson, *Two Views on the Impact*

of Ring v. Arizona on Capital Sentencing, 54 Ala. L. Rev. 1091, 1130-34 (2003); *Palmer*, 293 F. Supp. 2d at 1057; *contra*, *Brown*, 67 P. 3d at 920. In any event, in light of the conflicting decisions concerning the continuing vitality of *Cabana* after *Ring*, as reflected in the holdings of *Palmer* and *Brown*, the conflict is plainly one that requires resolution by this Court.

Parker never received a jury determination at his initial trial concerning the presence of the heightened *mens rea* requirements of *Enmund* and *Tison*. This Court should grant the petition to address the continued validity of *Cabana* in light of *Ring* and, upon granting the petition, vacate Parker's sentence.

B. The Court Should Grant the Petition to Address Whether Evidence of a Defendant's Pre-Rights Invocation State of Mind Can Be Relied Upon to Establish Post-Rights Invocation Initiation Under *Edwards v. Arizona* and *Michigan v. Jackson*

1. Summary of Reasons for Granting the Petition

Once a person in custody invokes his right to counsel under either the Fifth or Sixth Amendment, the police may make no further contact outside the presence of counsel for the purpose of a further interview absent a showing that the person in custody initiates that contact. *Edwards v. Arizona*, 451 U.S. 477 (1981); *Michigan v. Jackson*, 475 U.S. 625 (1986). As discussed below, there is no evidence of Parker's initiation of the contact that led to his May 7 Statement other than the facts and circumstances surrounding his unconstitutionally obtained interrogation on May 5. The Supreme Court of Florida, relying solely on evidence of Parker's intentions prior to his invocation of the right to counsel, concluded that such evidence met the State's burden to show Parker's initiation of the May 7 interview. That holding is contrary to the plain mandate of *Edwards* and *Jackson* that there be some evidence of a post-rights

invocation action taken by Parker to establish his initiation of a further interview, particularly in light of this Court's holdings that courts must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citations omitted), and should resolve all doubts "in favor of protecting the constitutional claim." *Jackson*, 475 U.S. at 633. This important issue of the constitutional sufficiency under *Edwards* and *Jackson* of a defendant's pre-rights invocation intention has not previously been addressed by this Court.

2. Argument

In assessing Parker's motion to suppress the May 7 Statement, the Supreme Court of Florida recognized that because Parker had invoked his right to counsel during the May 5 Statement, the state was precluded – pursuant to the right to counsel provided under both the Fifth Amendment (*Edwards*) and the Sixth Amendment (*Jackson*) – "from initiating further contact with Parker until counsel was provided." *Parker VI*, 873 So. 2d at 280 (Pet. App. 12a). Indeed, as the Eleventh Circuit held, once Parker invoked his right to counsel during the May 5 Statement, all further questioning, other than that seeking to clarify Parker's intent, was required to cease until conflict-free counsel was present. *Parker IV*, 974 F.2d at 1572-73.[7] Thus, whatever Parker said during the May 5 Statement after invocation of his right to counsel was inadmissible and, absent any subsequent initiation by Parker, the police could have no further contact for purposes of obtaining a statement. *Id.* at 1574.

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[7] The Eleventh Circuit also held that the representative of the Public Defender's Office that was present during the May 5 Statement could not serve as Parker's counsel in light of: (i) his acknowledged conflict of interest – a conflict that had an actual impact on his ability to represent Parker; and (ii) his status as an intern not yet admitted to the bar. *Id.* at 1570-72 (Pet. App. 62a).

In holding that there was sufficient evidence of Parker's post-invocation initiation, notwithstanding Parker's denial that he had initiated the May 7 contact, the Supreme Court of Florida relied only on the detective's statement "that he was directed by the Sheriff's office to speak to Parker pursuant to Parker's request" (873 So. 2d at 280)[8] (Pet. App. 12a) and on the testimony of two witnesses: 1) that of the intern from the Public Defender's Office who met with Parker at the time of his May 5 Statement and who testified that Parker "insisted on talking with police on May 5, despite [the intern's] advice not to do so;" and 2) that of Parker's trial counsel who testified that Parker "had always represented, with respect to the May 5 interview, that he wanted to talk to the police." *Id.* at 281.

None of those three pieces of evidence, nor all together, permit a finding of any post-invocation initiation by Parker consistent with *Edwards* and *Jackson*.

The testimony of Parker's trial counsel and the intern who met with him on May 5 indisputably concerned solely Parker's intentions as of the time of the statement he made on May 5. Although Parker initially requested to speak with the sheriff on that date, he thereafter validly invoked, and did not subsequently waive, his right to have counsel present. *Parker IV*, 974 F.2d at 1572-74 (Pet. App. 60a-62a). As the Eleventh Circuit found:

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[8] The Supreme Court of Florida did not accurately transcribe what Detective Powers had, in fact, stated. In his affidavit, Detective Powers states:

> I do not recall who it was that had told me that Parker had contacted someone at the Sheriff's department and indicated that he wished to cooperate in the investigation.

(Pet. App. 89a).

> These facts indicate that Parker may well have initially contacted Sheriff Holt to request to call his mother about an attorney. This interpretation is certainly consistent with the statements Parker made in his taped statement. Parker simultaneously seems to have asked to tell his side of the story, which request is also consistent with the statement. However, even if Parker initially contacted Sheriff Holt *only* in order to make a statement, our precedents demonstrate that Parker's subsequent and repeated requests for a different attorney make the resulting statement inadmissible.
>
> * * *
>
> The transcript of the statement reveals that Parker requested a different lawyer five times prior to making his statement. Subsequently, the student Greene twice asserted that he was Parker's lawyer. Finally, Sheriff Holt took over and told Parker that Greene was Parker's lawyer. Holt then reminded Parker of the reason Parker wanted to talk, because "you felt like that there was something being put on you that wasn't right. You wanted to tell me the story just like it was." Parker gave a statement, but he never indicated that he wanted to give a statement without a different lawyer present, and he never signed the waiver of rights form that Sheriff Holt proffered him. Therefore, Parker clearly asserted his right to counsel.

Id. at 1570-72 (footnotes omitted) (Pet. App. 54a-58a).[9]

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[9] Moreover, the Supreme Court of Florida, in seeking to discern Parker's intent on May 7 through reliance on his intent on

That on May 5 Parker wished to cooperate with law enforcement thus cannot, consistent with the requirements of *Edwards* and *Jackson*, serve to fill the void created by the lack of any evidence whatsoever that Parker, at any time *after* the May 5 Statement, initiated a new contact with law enforcement for purposes of making a further statement. Under *Edwards* and *Jackson*, once a defendant invokes the right to counsel, a new affirmative act of initiation needs to occur before law enforcement can proceed with an interview. *Edwards*, 451 U.S. at 485-86; *Jackson*, 475 U.S. at 636. As the Court held in *Edwards*, "a valid waiver" of the Fifth Amendment right to counsel cannot be established by showing only that the defendant "responded to further police-initiated custodial interrogation" but requires that the State establish that the defendant "himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-85; *see also id.* at 486 n. 9 (demonstrating that a purported waiver is knowing and intelligent includes "the necessary fact that the accused, not the police, reopened the dialogue with the authorities").

The statement of the detective who conducted the May 7 interview cannot satisfy the State's burden to demonstrate the necessary fact of Parker's initiation on May 7. As an initial matter, the detective's statement fails to indicate at all *when* Parker's alleged indication of a willingness to cooperate, characterized by the Supreme Court of Florida as a "request," occurred: it is therefore no evidence at all of a post-rights invocation initiation. (*See* Pet. App. 89a-90a). Nor can any inference of post-invocation initiation be drawn. The sole basis for the detective's understanding that Parker wished to cooperate in the investigation was what he was told this by a representative of the sheriff's office, whom he believed to be the sheriff. (Pet. App. 89a-90a).

May 5, overlooked the fact that, on May 6, when approached by law enforcement officers, Parker refused to speak to them.

However, the sheriff testified that he did not believe that he had any contact with Parker after the conclusion of the May 5 Statement. (Pet. App. 92a). In making that statement to the detective on May 7, the sheriff accordingly can only have been referring to Parker's expressed willingness during the May 5 Statement to cooperate, not to any new act by Parker to initiate a further interview.

As the detective's testimony concerning the events of May 7 makes clear, the purpose of the detective's meeting with Parker on that date was to persuade Parker to accompany the detective on a tour of the crime scene. *See Parker IV*, 974 F.2d at 1575-76 . There is no evidence whatever to support the notion that such a tour was suggested by Parker. The *only* evidence of what transpired on May 7 or earlier to lead to such a tour again comes from the May 5 Statement itself. It was during the interview on May 5 that the sheriff suggested such a tour. When questioned about his post-May 5 contacts with Parker, the sheriff confirmed that the tour was initiated based on Parker's stated willingness on May 5 to cooperate, not on any new contact Parker had initiated: "I think it probably relates in here [*i.e.* in the May 5 Statement], that he wanted to – to show where the – the knife was thrown from the car but I didn't – I didn't go out with him someone else from the sheriff's office carried him out to the – the scene."[10] (Pet. App. 92a).

When an accused initiates further contact with law enforcement after the invocation of the right to counsel under either the Fifth Amendment or Sixth Amendment,[11] he is

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[10] The evidence thus only supports the following sequence of events: the sheriff, not aware of the constitutional infirmity underlying his May 5 interview, and without any additional contact with Parker, asked the detective on May 7 to meet with Parker to follow upon Parker's May 5 stated willingness to cooperate.

[11] As the Supreme Court of Florida held, both amendments apply here. *See Parker VI*, 873 So. 2d at 280. (Pet. App. 12a).

taking the first step toward a waiver of his right to counsel. *See Oregon v. Bradshaw*, 462 U.S. 1039 (1983). As the Court made clear in *Edwards* and *Jackson*, the inquiry into whether an accused initiated a further interrogation is part of the inquiry into whether the defendant has validly waived his right to counsel. *Edwards*, 451 U.S. at 484-86, 486 n. 9 (to establish a waiver of the right to counsel, it is a "necessary fact" that the accused, not the police, reopened the dialogue); *Jackson*, 475 U.S. at 630 ("The question in these cases is whether respondents validly waived their right to counsel at post-arraignment custodial interrogations"). Assessing whether a defendant has waived constitutional rights, as the *Jackson* Court recognized, requires that the court "'indulge in every reasonable presumption against waiver of fundamental constitutional rights'" and that "[d]oubts . . . be resolved in favor of protecting the constitutional claim." 475 U.S. at 633 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also Brewer v. Williams*, 430 U.S. 387, 404 (1977).

The Supreme Court of Florida, in upholding the re-sentencing court's finding that Parker initiated the contact with the detective on May 7, failed to follow these precedents. Rather than "indulge in every reasonable presumption against waiver," as required, it did the opposite by concluding that pre-rights invocation evidence of a willingness to cooperate could constitute competent evidence of a post-rights invocation initiation of a further interrogation. And rather than resolve doubts in favor of protecting the constitutional claim, the Supreme Court of Florida resolved all doubts in favor of the State in finding, based on the detective's hearsay statement that on May 7 he was told that at some unspecified time Parker had expressed a willingness to cooperate, that Parker had made a new, post-rights invocation approach to law enforcement seeking to

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This Court, however, has yet to address the applicability of *Bradshaw* to cases arising under the Sixth Amendment.

make a further statement. This Court should grant certiorari to decide whether a finding of initiation sufficient under *Edwards* and *Jackson* can be based solely on evidence of pre-rights invocation intent, and is subject to the same demanding waiver standards as that required for establishing a waiver of constitutional rights generally.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

Dated: July 23, 2004

Respectfully submitted,

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APPENDIX A—OPINION OF THE SUPREME COURT OF FLORIDA DATED JANUARY 22, 2004

SUPREME COURT OF FLORIDA

No. SC01-172

J.B. PARKER, an individual

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Decided January 22, 2004

PER CURIAM

J.B. Parker appeals a death sentence imposed following a new penalty phase after his previous death sentence was vacated because the State failed to produce exculpatory evidence.[1] We previously affirmed Parker's convictions for kidnapping, robbery with a firearm, and first-degree murder. For the reasons that follow, we affirm Parker's death sentence.

FACTS AND PROCEDURAL HISTORY

In 1982, Parker and three other defendants, John Earl Bush, Alphonso Cave, and Terry Wayne Johnson, robbed a convenience store. The facts are set forth in detail in our opinion on Parker's first direct appeal. *See Parker v. State,*

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[1] We have jurisdiction over all death penalty appeals. *See* art. V, § 3(b)(1), Fla. Const.

476 So. 2d 134, 135 (Fla. 1985). We summarized the facts in our most recent opinion in this case as follows:

> Money was taken from the store and the female store clerk [Frances Slater] was also taken from the store and placed in Bush's car. The victim was later found dead; she had been shot and stabbed. Death was caused by a gunshot wound to the back of the head. Bush's girlfriend testified that Parker had admitted to her that he shot the victim and that Bush had stabbed her. The girlfriend's mother and sister testified that she told them of Parker's confession. Parker's pre-trial statements to police regarding the crime were also introduced and Parker also testified at trial. In those statements, he implicated himself in the crimes but denied being the shooter.

State v. Parker, 721 So. 2d 1147, 1148 (Fla. 1998).

In 1998, Parker was granted a new penalty phase due to the discovery of favorable evidence withheld by the State in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See Parker*, 721 So. 2d at 1149. During the new penalty phase, the State presented witnesses to establish the facts of the original crime and Parker's culpability, including codefendant Johnson, who recounted the events leading to Slater's murder.

Johnson testified that the first time the defendants went to the convenience store, all four went in to buy potato chips and that when they returned to the store later that evening, Parker went into the store with Cave and Bush to commit the robbery. Johnson also testified that when they arrived at the location where Slater was killed, Parker took the gun from Cave. Johnson stated that he heard a shot but did not know who shot Slater, that after the murder Parker told Bush to get

rid of the knife, and that the four later split the money taken from the store.

The State also introduced a statement made by Parker on May 7, 1982, when he went with Detective David Powers to the area where the victim was killed. During this time, Parker stated that Bush both stabbed and shot the victim, indicated where Bush had thrown the knife after the murder, and recounted that the four defendants discussed killing a sheriffs deputy, Timothy Bargo, who stopped the car in which they were riding on the night of the murder.

Parker presented several witnesses in mitigation. Of significance for the purposes of Parker's appeal is the testimony of Richard Barlow, who was the prosecutor during Cave's 1993 penalty phase. Barlow stated that he relied on the testimony of Michael Bryant, who was in the same cell as Cave at the Martin County jail, to establish that Cave was a principal in Slater's murder. Barlow testified that Bryant went to Arthur Jackson, who was running the jail at the time, and told Jackson that he overheard a conversation between Cave and Bush, in which Cave admitted that he "popped a cap" in the back of Slater's head.

In addition, portions of Michael Bryant's testimony given during Cave's 1993 penalty phase were read into the record. Bryant testified about the conversation he overheard between Cave and Bush:

> Well what I overheard, Bush was a couple of cells down and what it was, you know, they started talking about it and Bush told Cave, says, we wouldn't never be in here if you didn't try to burn her with a cigarette butt. He says, well, you stabbed her in the stomach and Bush told Cave, he says, well, you popped a cap in the back of her head.

The jury returned a verdict recommending a sentence of death for Parker by a vote of eleven to one. The trial court found five aggravating factors: (1) the capital felony was committed while the defendant was engaged in the commission of a kidnapping; (2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (3) the capital felony was committed for pecuniary gain; (4) the capital felony was especially heinous, atrocious, or cruel ("HAC"); and (5) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification ("CCP"). The trial court found one statutory mitigator,[2] that the defendant was nineteen years of age at the time of the crime (very little weight), and found thirteen nonstatutory mitigators, giving all but two little or very little weight.[3] The trial court

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[2] In its sentencing order, the trial court explicitly considered and gave no weight to the following statutory mitigators: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor; (3) the defendant acted under extreme duress or under the substantial domination of another; and (4) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

[3] The nonstatutory mitigators the trial court found were: (1) the defendant cooperated with law enforcement (moderate weight); (2) the defendant had an abused or deprived childhood, experienced childhood hunger, was raised in poverty, was raised without a father figure, and was left unsupervised at home (little weight); (3) the defendant is psychologically classified as a follower (very little weight); (4) the defendant's behavior in prison has been good for the most part (very little weight); (5) the defendant does well in a structured environment such as prison (very little weight); (6) the defendant exhibited appropriate behavior during his trials (very little weight); (7) the defendant developed a relationship with Audrey Rivers, a woman who visited him somewhat regularly (very little weight); (8) the defendant was under the influence of alcohol on the night of the crime (very little weight); (9) the defendant performed well as a public school athlete (little weight); (10) the

rejected the nonstatutory mitigator that Parker was not the actual triggerman. Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court agreed with the jury's recommendation and imposed the death penalty. On appeal Parker raises numerous issues, each of which we address below.[4]

II. Motion To Suppress

Prior to his initial trial, Parker filed a broad motion to suppress seeking to exclude "all written and oral statements

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defendant is a slow learner and was teased as a child (little weight); (11) the defendant left school to help his family, was not a violent or cruel child, was a kind and helpful child, and protected his family (moderate weight); (12) the defendant treated his teachers with respect and was not an aggressive child (little weight); and (13) the lapse of time between the defendant's first trial and the current penalty phase was caused by the State's discovery violation (very little weight).

[4] Parker claims that (1) the trial court erred in denying Parker's motion to suppress; (2) the trial court erroneously excluded certain defense evidence; (3) the trial court erred in failing to grant a motion for mistrial based on the prosecutor's improper comment during closing argument; (4) the trial court's misstatement to the venire panel denied Parker the right to a fair trial; (5) the trial court erred in finding HAC; (6) the trial court erred in finding CCP; (7) the trial court erred in finding the avoid arrest aggravator; (8) the trial court erred in finding the pecuniary gain aggravator; (9) the trial court failed to assign the proper weight to the mitigating factors established and Parker's death sentence is disproportionate; (10) the felony murder aggravator is unconstitutional on its face and as applied; (11) the trial court erred in allowing the State to rehabilitate a witness with statements of an unidentified person; (12) the State's use of inconsistent "triggerman" theories is a violation of Parker's due process rights; (13) the trial judge lacked the authority to preside over the penalty-phase proceeding; (14) Florida's death penalty statute is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002); (15) the delay between Parker's indictment and new penalty phase constitutes cruel and unusual punishment in violation of the Eighth Amendment; and (16) the trial court erred in denying Parker's request for a special jury instruction on circumstantial evidence.

made by the Defendant to police authorities or other agents of the State of Florida." After an evidentiary hearing, the trial court denied the motion.

On direct appeal to this Court, Parker argued that the trial court erred in denying his motion to suppress. Specifically, Parker asserted that a taped statement given to police on May 5, 1982, was taken in violation of his Fifth Amendment right to remain silent until he was able to speak with an attorney. We concluded that the trial court did not err in denying the motion to suppress. *See Parker*, 476 So. 2d at 137-38. On appeal from the denial of his federal habeas petition, the Eleventh Circuit Court of Appeals concluded that the May 5 statement was taken in violation of Parker's Fifth Amendment right to counsel. *See Parker v. Singletary*, 974 F.2d 1562, 1574 (11th Cir. 1992). However, the Eleventh Circuit held that the admission of this statement was harmless error as to both the guilt and penalty phases. Id. at 1576-77.

Prior to the penalty phase at issue in this appeal, Parker filed another motion to suppress, focusing primarily on his May 7 statement to Detective Powers. Parker argued that the May 7 statement resulted directly from the May 5 statement found to be inadmissible by the Eleventh Circuit, see id. at 1574, and that because the police initiated the May 7 interview, the United States Supreme Court's decision in *Michigan v. Jackson*, 475 U.S. 625 (1986), decided after Parker's original trial, required suppression of the May 7 statement.[5] The State did not challenge the Eleventh Circuit's ruling that the May 5 statement was taken in violation of Parker's Fifth Amendment right to counsel and

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[5] The Court held in *Jackson* that if police officers initiate an interrogation after a defendant asserts his or her Sixth Amendment right to counsel, any waiver of the right for that police-initiated interrogation is invalid. *See* 475 U.S. at 636.

did not seek to introduce this statement during the new penalty phase. However, the State filed a motion to quash Parker's motion to suppress, asserting that Parker was barred from raising the issue of the admissibility of the May 7 statement because he had previously filed a motion to suppress this statement and had not pursued the issue on appeal. The trial court granted the motion to quash and never reached the merits of Parker's motion to suppress his May 7 statement.

After oral argument in this appeal, we relinquished jurisdiction to the trial court with directions to conduct an evidentiary hearing on the motion to suppress and thereafter to issue an order on the merits of the motion. We reached the conclusion that the trial court should have considered the merits of the motion to suppress, for two related reasons. First, because this was a new penalty phase, the "clean slate" principle discussed in *Preston v. State*, 607 So. 2d 404, 408-09 (Fla. 1992), applied. Second, and contrary to the State's assertion, because the admissibility of Parker's May 7 statement had never been litigated and decided in any prior appeals, Parker was not barred from litigating this issue under either the doctrine of law of the case or *res judicata*.

We recently clarified the scope of both *res judicata* and law of the case, stating:

> [T]he doctrines of the law of the case and *res judicata* differ in two important ways. First, **law of the case applies only to proceedings within the same case, while *res judicata* applies to proceedings in different cases. Second, the law of the case doctrine is narrower in application in that it bars consideration only of those legal issues that were actually considered and decided in a former appeal**, while *res judicata* bars relitigation in a subsequent case or action not

> only of claims raised, but also claims that could have been raised.

Florida Dep't of Transp. v. Juliano, 801 So. 2d 101, 107 (Fla. 2001) (emphasis supplied) (citations omitted). Clearly, law of the case does not apply to Parker's claim in that, as the State admits, the issue of the admissibility of the May 7 statement was never actually considered and decided by this Court in Parker's first appeal. Further, even if law of the case applied, "[t]his Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997).

As to *res judicata*, the key question is whether this penalty phase is a new and different case. We conclude that it is not. *Cf. Juliano*, 801 So. 2d at 105 ("Where successive appeals are taken in the same case there is no question of res judicata, because the same suit, and not a new and different one, is involved."). Although a new penalty phase is a "completely new proceeding," *Lucas v. State*, 841 So. 2d 380, 387 (Fla. 2003), the guilt and penalty phases of a capital trial are parts of the same case and the death sentence imposed after Parker's new penalty phase is not final until affirmed by this Court on direct appeal. *See Huff v. State*, 569 So. 2d 1247, 1250 (Fla. 1990) (noting that for the purpose of determining the commencement of two-year time limit in which to file a motion for postconviction relief, the judgment and sentence become final when direct review proceedings are completed and the court issues the mandate). Further, it is the law at the time of Parker's new penalty phase that determines the admissibility of the evidence during that proceeding. *Cf. Lawrence v. State*, 691 So. 2d 1068, 1072 (Fla. 1997) (rejecting the defendant's argument that victim-impact evidence was not admissible during his resentencing because it was not admissible at the time of his original sentencing proceeding); *Dougan v. State*, 470 So. 2d 697,

701 n.2 (Fla. 1985) (rejecting the State's argument that the Court should apply the case law "extant at trial or when [the] case was first appealed" rather than the case law in use at the time of present appeal). Thus, Parker was not barred from litigating whether his May 7, 1982, statement was admissible in his new penalty phase.

With respect to the merits of Parker's motion to suppress, the trial court found that Parker initiated contact with police on May 7 and that Parker's waiver of rights was knowing and voluntary. Therefore, the trial court entered an order denying the motion. Parker contends this was in error. We disagree.

Generally, in reviewing a trial court's ruling on a motion to suppress, this Court accords a presumption of correctness to the trial court's findings of historical fact, reversing only if the findings are not supported by competent, substantial evidence, but reviews de novo "whether the application of the law to the historical facts establishes an adequate basis for the trial court's ruling." *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001), *cert. denied*, 535 U.S. 1103 (2002). However, this deference to the trial court's findings of fact does not fully apply when the findings are based on evidence other than live testimony. *Cf. Thompson v. State*, 548 So. 2d 198, 204 n.5 (Fla. 1989) ("[T]he clearly erroneous standard does not apply with full force in those instances in which the determination turns in whole or in part, not upon live testimony, but on the meaning of transcripts, depositions or other documents reviewed by the trial court, which are presented in essentially the same form to the appellate court.").

In this case, rather than hold an evidentiary hearing, the trial court accepted a stipulated record consisting, in relevant part, of Parker's 1988 postconviction testimony and 2002 affidavit; Detective Powers' 1982 suppression hearing testimony, 1982 deposition and 2002 affidavit; Sheriff Holt's

1982 deposition; the 1988 postconviction testimony of Parker's trial attorney; and the 1988 postconviction testimony of Steven Green, an intern sent by the Public Defender's office to the jail to advise Parker on May 5, 1982. Nevertheless, we conclude that it is appropriate to give deference to the trial court's findings of Fact to the extent they are supported by competent, substantial evidence. Although the judge who presided over Parker's new penalty phase and entered the order on the motion to suppress was not the original trial judge in this case, he did preside over Parker's 1988 postconviction evidentiary hearing, which was presented as part of the stipulated record and during which live testimony was presented. Because we conclude that the trial court's finding that Parker initiated the May 7 interview is supported by competent, substantial evidence and that Parker's waiver of his Fifth and Sixth Amendment rights was knowing and intelligent, we affirm the denial of the motion to suppress.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the United States Supreme Court held that under the Fifth Amendment, once an accused person in custody has expressed his or her desire "to deal with the police only through counsel, [that person] is not subject to further interrogation by the authorities until counsel has been made available . . . **unless the accused . . . initiates further communication, exchanges, or conversations with the police.**" Id. at 484-85 (emphasis supplied). Subsequently, the Supreme Court extended the rule enunciated in *Edwards* to cases involving a defendant's Sixth Amendment right to counsel. *See Jackson*, 475 U.S. at 636. In *Jackson*, the Supreme Court held that "if police initiate interrogation after a defendant's assertion, at arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid," and the resulting statement is inadmissible as substantive evidence against the defendant. *Id.*; see also Phillips v. State,

612 So. 2d 557, 559 (Fla. 1992) ("Once the right [to counsel] attaches under either [the Sixth Amendment or article I, section 16 of the Florida Constitution] and is invoked on a particular charge, police may not initiate questioning on that charge in the absence of counsel."). Parker argues that because he did not initiate the May 7 communication with Detective Powers, both his Fifth and Sixth Amendment rights were violated and his statement should have been suppressed.[6]

The Eleventh Circuit Court of Appeals held that the State violated Parker's Fifth Amendment right to counsel during the May 5, 1982, interview. *See Parker*, 974 F.2d at 1574. The State has not challenged this ruling on the mixed question of law and fact in either the trial court or on appeal. Thus, the police were prohibited under *Edwards* from initiating further contact with Parker until counsel was provided. The same is true under *Jackson* because Parker asserted his Sixth Amendment right to counsel at his May 5, 1982, arraignment when he expressed his intention to try to hire his own attorney. *See Smith v. State*, 699 So. 2d 629, 638 (Fla. 1997) ("The Sixth Amendment right to counsel attaches at the earliest of the following points: formal charge, preliminary hearing, indictment, information, or arraignment."); *see also Patterson v. Illinois*, 487 U.S. 285, 290-91 (1988) (rejecting the defendant's argument that because his Sixth Amendment right to counsel attached, police were barred from initiating an interview where the defendant at no time sought to exercise his right to have

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[6] The State asserts that because Parker's original trial took place prior to the *Jackson* decision and this Court decided that *Jackson* was not to be applied retroactively, *see Henderson v. Dugger*, 522 So. 2d 835, 837 (Fla. 1988), this Court need not reach the merits of Parker's Sixth Amendment claim. However, as previously explained, because the new penalty phase was a new proceeding, neither the trial court nor this Court is precluded from applying case law rendered after the original sentencing.

counsel present). Thus, the admissibility of Parker's statements to Powers, under both the Fifth and Sixth Amendments, turns on whether Parker initiated the communication with Powers and, if so, whether Parker's waiver of rights was valid; i.e., whether under the totality of the circumstances the waiver was knowing and intelligent. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983) (stating that the fact that the defendant initiated a conversation with police is not alone sufficient to show a valid waiver of a previously asserted right to counsel).

The stipulated record before the trial court contained conflicting evidence on whether Parker initiated the May 7 interview with Detective Powers. Parker stated through an affidavit that he did not initiate contact with the sheriffs office. Detective Powers stated, to the contrary, that he was directed by the sheriffs office to speak to Parker pursuant to Parker's request.

Although Parker asserts that Powers' testimony alone cannot be considered competent to establish that Parker initiated the May 7 interview because it is hearsay, Parker stipulated to the admissibility of this evidence and cannot now assert that the trial court was precluded from considering Powers' testimony in addressing the motion to suppress. *See Laws v. State*, 356 So. 2d 7, 8-9 (Fla. 4th DCA 1977) ("[T]he general rule is that otherwise inadmissible evidence, received without objection, may properly be considered in determining the facts in issue."). Further, the trial court had before it the testimony of Parker's trial counsel and Steven Green, the intern sent from the Public Defender's office, which supports the trial court's finding. Parker's trial counsel testified that Parker had always represented, with respect to the May 5 interview, that he wanted to talk to the police to tell his side of the story and let the police know that what Bush was saying was not true. Green similarly testified that Parker insisted on talking with police on May 5, despite

Green's advice not to do so. This additional evidence indicates that Parker was eager to communicate with police regarding Slater's murder. Thus, we conclude that the trial court's finding that Parker initiated the contact with law enforcement on May 7, 1982, is supported by competent, substantial evidence.

We further conclude that under the totality of the circumstances, Parker's May 7 waiver of his Fifth and Sixth Amendment rights was knowing and intelligent.[7] *See Thompson*, 548 So. 2d at 204 (stating that Florida adheres to the "totality of the circumstances approach" in cases involving the wavier of constitutional rights); *see also Ramirez v. State*, 739 So. 2d 568, 575 (Fla. 1999) ("Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived."). Parker signed a waiver of rights form, was allowed to call his mother as requested, and did not ask for an attorney during the May 7 interview. In addition, contrary to Parker's assertion, Detective Powers' written statement on the waiver form indicating that Parker was being represented by the Public Defender was not a misstatement at that time. Pursuant to a May 6, 1982, order rescinding the appointment of alternative counsel, the Public Defender was still representing Parker as of May 7, 1982. We therefore affirm the trial court's order denying Parker's motion to suppress.

III. Exclusion Of Defense Evidence

Parker next claims that the trial court erred in excluding certain defense evidence, including letters from Parker to witness Audrey Rivers, affidavits of various

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[7] Parker does not argue that his statement to Detective Powers on May 7 was involuntary.

unavailable witnesses, and portions of witness Richard Barlow's testimony. We conclude that the trial court did not abuse its discretion in excluding this evidence.

A. Letters From Parker to Audrey Rivers

Audrey Rivers, who met Parker during her employment with the Florida Volunteer Lawyers Resource Center, testified regarding her friendship with Parker. In conjunction with Rivers' testimony, Parker sought to submit into evidence several letters that he wrote to Rivers during the time he was incarcerated for this crime. The State objected. The trial court sustained the State's objection, finding that the letters would be cumulative of other evidence, but did not prevent Rivers from characterizing portions of the letters from Parker. Parker contends that this ruling was in error. We disagree.

Section 90.403, Florida Statutes (2003), provides that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." (Emphasis supplied.) In Mendoza v. State, 700 So. 2d 670 (Fla. 1997), we held that the trial court did not err in excluding defense evidence of an application for political asylum in part because the document "was merely a self-serving statement filed in the public records." *Id.* at 675. We further concluded that given the testimony of the defendant's mother about his childhood, the document would have been cumulative. *See id.*

In this case, the trial court explicitly ruled that Rivers could characterize the contents of the letters. In fact, Rivers testified as to the types of things Parker wrote about, explaining that in some of the letters Parker expressed deep concern for her family, and in others, he expressed concern for his own family. Rivers then discussed the contents of a number of Parker's letters. For example, Rivers testified that

in one letter Parker wrote about being "taken from his cell to see the physician" and "describing what a heavenly sight it was to see freshly raked leaves in a rose garden." Because the letters were cumulative of other evidence and because the trial court allowed Rivers to characterize the contents of the letters, we conclude that the trial court did not abuse its discretion in refusing to admit the letters themselves into evidence.

B. Affidavits of Unavailable Witnesses

Parker also asserts that the trial court erred in failing to admit certain affidavits of witnesses who were found to be unavailable to testify during his penalty phase. These witnesses were Elmira Parker (Parker's deceased mother), Douglas Smith (the companion of Parker's mother who is also deceased), Katie Lee Parker (Parker's sister who is suffering from Alzheimer's and is therefore incompetent to testify), Rosie Lee Parker (Parker's sister), and Gloria Marshall and Martha Rahming (both former teachers).

This Court has recognized that "even though section 921.141(1)[[8]] relaxes the evidentiary rules during the penalty phase of a capital trial" a party cannot introduce hearsay evidence unless the opposing party has a fair opportunity to rebut the hearsay. *See Blackwood v. State*, 777 So. 2d 399, 411 (Fla. 2000). In *Blackwood*, we upheld the exclusion of the deceased victim's hearsay statements to a friend, explaining that the State had no fair opportunity to rebut because the State could not question the victim. *See id.* at 412.

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[8] Section 921.141(1), Florida Statutes (2003), provides that "[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements."

In this case, the trial court allowed the introduction of the affidavits only to the extent that the information contained therein related to family history as specified in section 90.804(2)(d), Florida Statutes (2003).[9] In deciding to exclude the remainder of the information contained in the affidavits, the trial court concluded that the State had no fair opportunity to rebut their contents. We agree with this determination and conclude that the trial court did not err in excluding the affidavits.

C. Richard Barlow's Testimony

Lastly, Parker contends that the trial court erred by limiting the testimony of former assistant state attorney Richard Barlow, who presented the testimony of Michael Bryant during Cave's 1993 penalty phase to establish that Cave was the shooter. Specifically, Parker argues that the trial court erred in precluding Barlow from testifying both as to what Bryant had told Barlow during their conversations prior to Cave's trial and as to Barlow's professional considerations in evaluating Bryant's statement in conjunction with the medical examiner's evidence. We find no error in the trial court's exclusion of this evidence.

Parker asserts that Bryant's statement to Barlow is not hearsay because it was not offered to prove the truth of the statement but rather to show that Bryant's statements to both

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[9] Section 90.804(2) contains four hearsay exceptions that apply when the declarant is unavailable as a witness. Under subsection (d), "Statement of personal or family history," the exception applies to:

> A statement concerning the declarant's own birth, adoption, marriage, divorce, parentage, ancestry, or other similar fact of personal or family history, including relationships by blood, adoption, or marriage, even though the declarant had no means of acquiring personal knowledge of the matter stated.

Barlow and Arthur Jackson were consistent. Essentially, Parker was attempting to bolster Bryant's own testimony, which was subsequently read to the jury in this trial. "We have long held that prior consistent statements 'are generally inadmissible to corroborate or bolster a witness' trial testimony.'" *Chandler v. State*, 702 So. 2d 186, 197 (Fla. 1997) (quoting *Rodriguez v. State*, 609 So. 2d 493, 499 (Fla. 1992)). In addition, because Bryant's prior testimony was read to the jury, any testimony from Barlow about what Bryant said would have been cumulative. *See Mendoza*, 700 So. 2d at 675. Thus, it was within the trial court's discretion to preclude Barlow's testimony on this issue.

With respect to the exclusion of Barlow's professional considerations in evaluating the credibility of Bryant's statements, the trial court sustained the State's objection to this line of questioning, ruling that the prosecutor's "actual professional thought process" in evaluating a witness was not relevant. However, the trial court subsequently recognized during cross-examination that the State had opened the door to Barlow's mental processes and that on redirect Parker would be allowed to question Barlow on this issue. It was Parker's responsibility to reopen this line of questioning, which he failed to do. We therefore conclude that the trial court did not commit reversible error in sustaining the objection to testimony about the prosecutor's evaluation of Bryant as a witness.

IV. Prosecutor's Closing Argument

In Parker's next issue on appeal he asserts that the trial court erred in failing to grant his motion for a mistrial after the prosecutor made an improper comment during closing argument. The comment at issue occurred during the prosecutor's discussion of the testimony of Georgeann Williams, codefendant Bush's girlfriend at the time of the murder:

> But Georgeann Williams is the one who knows what was said and done. So what you have to look at is, can she be believed? Is her testimony worthy of belief? Why is it? Well, first of all, the testimony that she gave here in this courtroom was consistent, completely consistent with the testimony that she gave not only against this Defendant, but against her own boyfriend. She testified in both of their trials.
>
> **When she went to the jail to visit John Earl Bush and he told her, "I stabbed the girl but Parker shot her."** She wanted to believe that. But she couldn't be sure if she could believe that. She had to hear it from Parker. So she said she went over to his cell.

(Emphasis supplied.)

Parker objected and moved for a mistrial, arguing that Williams never testified that Bush told her Parker was the shooter. In fact, Williams testified at trial that during her conversation with Parker at the county jail, **Parker told her** that Bush stabbed Slater and he (Parker) shot Slater. The prosecutor agreed that Williams did not testify that Bush made a statement that Parker was the shooter and offered to correct the misstatement. Based on the prosecutor's promise to correct the argument, the trial court denied Parker's motion for a mistrial. When closing arguments resumed, the prosecutor made the following correction:

> Ladies and Gentleman, what Counsel just brought to the attention of the Judge is that at sometime during my argument, that apparently he picked up that I said that Georgeann Williams testified that John Earl Bush told her that Parker did the shooting.

> That's not evidence in this case. That's not evidence at all. I don't recall saying that, but I don't doubt it if that's what he said I did. That is not evidence and it's not something you should consider because that wasn't said. Our contention is that it was Parker who admitted to Georgeann Williams that he did the shooting. She did talk to Bush and then she went to Parker because she wanted to know from Parker what had happened and Parker told her that he shot Frannie Slater, John Earl Bush stabbed her. If I said anything other than that I didn't intend to and certainly wouldn't want you to consider what's not evidence in this case. So let's move on.

We conclude that the trial court properly denied Parker's motion for mistrial because the prosecutor's misstatement in this case was harmless beyond a reasonable doubt.[10] The prosecutor corrected his misstatement by telling the jury that no evidence was presented that Bush told Williams that Parker was the shooter and that the jury should disregard his comment to that effect. The prosecutor also told the jury that the State's contention was that Parker told Williams that he shot the victim, which is what Williams testified to during the penalty phase. Thus, the prosecutor effectively corrected any error in his previous argument, and we conclude that there is no reasonable possibility that this isolated comment affected the jury's decision to recommend

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10 In *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999), we held that "use of a harmless error analysis under *[State v.] DiGuilio*, [491 So. 2d 1129 (Fla. 1986),] is not necessary where . . . the trial court recognized the error, sustained the objection and gave a curative instruction." 751 So. 2d at 547. Because the trial court in this case neither sustained Parker's objection in front of the jury nor gave a curative instruction, we conclude that a harmless error analysis is appropriate in this case.

death. *Cf. Hitchcock v. State*, 755 So. 2d 638, 643 (Fla. 2000) (finding the prosecutor's erroneous comments during closing arguments about what the jury could consider in mitigation harmless where the comments were followed by a correct explanation of mitigation and where the judge gave the mitigating circumstance at issue "some weight" in the sentencing order). Accordingly, we affirm the trial court's denial of the motion for mistrial.

V. Trial Court's Misstatement During *Voir Dire*

Parker also contends that the trial court erred in denying his motion for a mistrial based on the trial court's misstatement made during *voir dire*. We conclude that the trial court did not abuse its discretion in denying a mistrial.

After the *venire* panel was sworn, the trial court made the following comments about the nature of the case, which are pertinent to this issue on appeal:

> Now, let me tell you what we're here on. This is the case of the State of Florida versus J.B. Parker. Now in this case the reason we are here as I've mentioned is not to determine whether Mr. Parker is guilty of a crime, that has been determined at an earlier time. Mr. Parker has been found guilty of murder in the first degree. . . . And the specific reason for which we are impaneling a jury in this case is to determine what is the appropriate sentence, whether Mr. Parker should be sentenced to the death penalty or should be sentenced to life in prison. . . . **This is a case, and I'm going to read from the original charge, where Mr. Parker has been charged and as indicted found guilty of the crime of first degree murder and he has been convicted of the unlawful and**

> **premeditated death of a human being by killing and murdering Frances Julia Slater,** a human being, on or about April 27, 1982, in Martin County, Florida.

(Emphasis supplied.)

Defense counsel moved for a mistrial and to strike the *venire* panel because the trial court misstated that Parker was convicted of premeditated murder when, in fact, the jury returned a general verdict convicting Parker of first-degree murder after being instructed that it could rely on either premeditation or felony-murder. The trial court denied the motion and then made the following statement to the *venire* panel:

> Members of the potential jury. In this case I have read you what the indictment, the original indictment stated. At the trial at which Mr. Parker was convicted, the State had two theories of first degree murder, one is premeditated murder and the other is felony murder during the course of a robbery or kidnapping and Mr. Parker was convicted of first degree murder after that case was submitted to him – or submitted to the jury and the lawyers may want to talk with you a little bit further about some of this that I've mentioned here.

On appeal, Parker asserts that the trial court's statement that he had been convicted of premeditated murder denied him a fair trial.[11]

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[11] We reject the State's argument that this issue was not preserved on the ground that it is not clear from the record that Parker was asking for a mistrial. After the trial court misstated that Parker was convicted of

In *Franqui v. State*, 804 So. 2d 1185, 1192 (Fla. 2001), we considered the defendant's claim that the trial court erred in stating during *voir dire* that the law required the jury to recommend a death sentence if jurors believed that the aggravating circumstances outweighed the mitigating circumstances. We concluded that the trial court's "isolated misstatements of the law during *voir dire*" were harmless. *Id.* at 1194. In determining that the error was harmless, we noted that the trial court's subsequent comments to the venire panel were consistent with the standard jury instruction on the issue, and that "[m]ore importantly," the trial court did not repeat the misstatement when it instructed the jury before deliberations. *Id.* at 1193.

In this case, the circumstances supporting a finding of harmless error are even stronger than those presented in *Franqui*. The trial court initially misstated that Parker had been "found guilty of the crime of first degree murder and . . . been convicted of the unlawful and premeditated death of a human being by killing and murdering Frances Julia Slater." However, the court did not repeat this misstatement and properly instructed the jurors prior to deliberations that their duty was to advise the court "as to what punishment should be imposed upon the Defendant for his crime of first degree murder." (Emphasis supplied.) In addition, and unlike the trial court in Franqui, the trial court in this case-corrected its misstatement after Parker objected. *Cf. Burns v. State*, 609 So. 2d 600, 604 (Fla. 1992) (holding that the defendant's due process rights were not violated when the trial court misspoke by instructing jurors to find the defendant guilty if the offense was "proved to your satisfaction by the greater weight of the evidence" but immediately corrected the misstatement and again explained,

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premeditated murder, defense counsel immediately objected and moved for a mistrial. Defense counsel also clearly stated that the objection still stood after the trial court explained that it would correct the misstatement.

before allowing the jury to resume deliberations, the proper standard of proof). Therefore, we conclude that the trial court did not abuse its discretion in denying Parker's motion for mistrial.

VI. Aggravating Circumstances

In issues five through eight on appeal, Parker challenges the trial court's finding of the HAC aggravator, the CCP aggravator, the avoid arrest aggravator, and the pecuniary gain aggravator.[12] Although the trial court must determine whether the State has proven each aggravating circumstance beyond a reasonable doubt, this Court's task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence supports its finding. See Gore v. State, 784 So. 2d 418, 432 (Fla. 2001). After reviewing the record in this case, we conclude that competent, substantial evidence supports the trial court's findings of the HAC, CCP, avoid arrest, and pecuniary gain aggravators.

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12 In his tenth issue on appeal, Parker also asserts the murder in the course of a felony aggravator as specified in section 921.141(5)(d), Florida Statutes (2003), is unconstitutional on its face and as applied in this case because it provides for an automatic aggravating circumstance and neither "narrow[s] the class of persons eligible for the death penalty" nor "reasonably justifies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder" as required by *Zant v. Stephens*, 462 U.S. 862, 877 (1983). We previously rejected this argument in *Blanco v. State*, 706 So. 2d 7, 11 (Fla. 1997). Further, we note that Parker's convictions for both kidnapping and robbery undermine his argument that section 921.141(5)(d) provides for an automatic aggravating circumstance in his case. The trial court relied only on Parker's kidnapping conviction in finding the murder in the course of a felony aggravator, whereas the jury's verdict finding him guilty of first-degree murder is supported, under felony-murder, by robbery in addition to kidnapping.

A. HAC

"To qualify for the HAC circumstance, 'the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim.'" *Hertz v. State*, 803 So. 2d 629, 651 (Fla. 2001) (quoting *Richardson v. State*, 604 So.2d 1107, 1109 (Fla. 1992)). We have held that "an instantaneous or near-instantaneous death by gunfire does not satisfy the aggravating circumstance of heinous, atrocious, or cruel," *Robinson v. State*, 574 So. 2d 108, 112 (Fla. 1991), and that "[e]xecution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim." *Hartley v. State*, 686 So. 2d 1316, 1323 (Fla. 1996).

Parker contends that the trial court erred in finding the HAC aggravator because the only direct evidence on the issue of whether the crime was conscienceless or pitiless was the testimony of Parker's codefendant Johnson, which flatly contradicts the trial court's conclusion that the victim was "begging that her life not be taken." Parker also contends that the trial court's findings that (1) "[h]air from the victim, consistent with being ripped from her head, was found in Bush's car"; (2) "[t]he victim's bladder was completely voided"; (3) the "excruciatingly painful stab wound" was inflicted while the victim struggled; and (4) "[t]he killing was not sudden and unexpected," are not supported by the evidence.

We recently affirmed a finding of HAC in codefendant Cave's case on evidence showing that Cave personally removed Slater from the store at gunpoint, heard her pleas for her life during the ride to an isolated area, and removed her from the car, turning her over to Bush and Parker, who stabbed and shot her. *See Cave v. State*, 727 So. 2d 227, 229 (Fla. 1998). In this case, the trial court made similar findings on the HAC aggravator:

> The victim suffered fear, emotional strain, and terror during the events leading up to the actual killing. The victim, an eighteen year old girl, was afraid to work on the night of her abduction. **She experienced great fear and terror during the robbery and during the thirteen mile, twenty minute ride to her death. She was frightened and was asking what the defendants were going to do to her, in effect begging that her life not be taken. Hair from the victim, consistent with being ripped from her head, was found inside Bush's car. The victim's bladder was completely voided while she was alive, prior to being shot. While she was alive she suffered an excruciatingly painful stab wound to her abdomen from a filleting type of fishing knife. The evidence clearly established that the stab wound was inflicted while she struggled.** A defensive injury received during a struggle was found on her hand. The killing was not sudden and unexpected.

(Emphasis supplied.)

The record reflects that the trial court's findings are supported by competent, substantial evidence. Testimony from a number of witnesses established that Slater was driven from the store where she was working to a remote location thirteen miles away. Although codefendant Johnson testified that Slater was told she was going to be let go, he also testified that she was frightened and continued to ask what they were going to do with her. The medical examiner testified that the stab wound in Slater's abdomen would have been a "painful wound," that it was inflicted while Slater was alive, and that the trajectory of the bullet was consistent with

Slater being stabbed, falling to her knees and then being shot in the back of the head. The medical examiner also testified that Slater had completely emptied her bladder before death, which would be consistent with either fear or the pain of being stabbed. Lastly, Daniel Nippes, an expert in fiber and hair comparison, testified that he found a head hair from Slater in Bush's car. Nippes opined that the follicular tissue attached to the hair indicated that it did not naturally fall "out of Slater's scalp but rather was "prematurely removed."[13] Because of the competent, substantial evidence presented, we find no error in the trial court's finding of HAC.

B. CCP

With respect to the CCP aggravating circumstance, Parker argues that but for the fact that he was in the store where the victim worked two or three hours before the murder, the State presented no evidence that he acted with the requisite cool and calm reflection and premeditation. Parker also argues that codefendant Johnson's testimony that Slater was told she was going to be let go contradicts the trial court's finding that "[t]here was no discussion among the defendants as to what they would do with her; her fate was a foregone conclusion."

To support a finding of the CCP aggravator, the evidence must show that the killing was the product of cool and calm reflection and not

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[13] As part of his challenge to the finding of HAC, Parker also argues that the trial court erred in allowing Nippes to give his opinion on this matter because the testimony about hair structure was outside Nippes' expertise. Parker has failed to show error in the trial court's ruling that Nippes was qualified to testify that the hair found in Bush's car was prematurely removed from Slater's sclap. *See Finney v. State*, 660 So. 2d 674, 682 (Fla. 1995) ("A trial court has broad discretion in determining the range of subjects on which an expert witness can testify, and, absent a clear showing of error, the court's ruling on such matters will be upheld.").

> an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994) (citations omitted). Although a plan to commit murder cannot be inferred solely because the defendants planned to commit another felony, *see Hertz*, 803 So. 2d at 650, "[c]old, calculated, premeditated murder can be indicated by the circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course." *Bell v. State*, 699 So. 2d 674, 677 (Fla. 1997). In addition, we have "previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder." *Alston v. State*, 723 So. 2d 148, 162 (Fla. 1998).

As with the HAC aggravator, we upheld the finding of CCP in codefendant Cave's case. *See Cave*, 727 So. 2d at 229. In that case, the evidence supporting CCP showed that Cave had the gun during the robbery, led the victim out of the store at gunpoint, kept the victim in the back seat of the car for the long ride out to the murder scene, and turned her over to Bush and Parker, who knifed and shot her. See id. In Parker's sentencing order, the trial court explained:

> The defendant carefully "cased" out the store two to three hours before the robbery. Upon returning to the store, Parker entered the store with Cave and Bush, **all three actively participating in the robbery**. None of the

> three defendants took steps to conceal their identity. **Although the victim could have been secured in the store, the defendants took her out to the car.** There was no discussion among the defendants as to what they would do with her, her fate was a foregone conclusion. **At the scene of the killing Parker initiated her murder by reaching over and demanding the gun from Cave, stating. "Hand me the gun". Parker admitted later to actually shooting the victim in the head.**

(Emphasis supplied.)

The record supports the trial court's finding of CCP. The defendants deliberately armed themselves with a knife and gun, removed Slater from the store after the robbery, and then drove thirteen miles to a remote location where Parker asked for the gun and then shot Slater execution-style in the back of the head. Further, no evidence was presented that Slater's murder occurred suddenly as the result of a struggle, *see Barwick v. State*, 660 So. 2d 685, 696 (Fla. 1995) (finding the CCP aggravator inapplicable where the evidence showed that the murder occurred when the victim resisted during a struggle and the evidence did not show the defendant planned to kill the victim), or was committed in a rash or spontaneous way. *See Mahn v. State*, 714 So. 2d 391, 398 (Fla. 1998) (concluding that the trial court erred in finding CCP where the "rash and spontaneous killing evidenced no analytical thinking, no conscious and well-developed plan to kill"). Thus, we conclude that the trial court did not err in finding CCP as an aggravating factor.

C. Avoid Arrest Aggravator

This Court has explained the circumstances under which the avoid arrest aggravator is appropriately found:

> The avoid arrest/witness elimination aggravating circumstance focuses on the motivation for the crimes. **Where the victim is not a police officer,** "the evidence [supporting the avoid arrest aggravator] **must prove that the sole or dominant motive for the killing was to eliminate a witness,**" and "[m]ere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator." However, **this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes.**
>
> In other cases, this Court has found it significant that the **victims knew and could identify their killer.** While this fact alone is insufficient to prove the avoid arrest aggravator, **we have looked at any further evidence presented, such as whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination, whether the victims offered resistance, and whether the victims were confined or were in a position to pose a threat to the defendant.**

Farina v. State, 801 So. 2d 44, 54 (Fla. 2001) (citations omitted) (emphasis supplied).

In the sentencing order in this case, the trial court found:

> The evidence establishes that the purpose of the abduction and killing was clearly to eliminate the only witness to the robbery.

> This was the sole or domin[ant] motive in killing the victim. The evidence also establishes that the defendant had been seen twice while he was in the Lil' General, once alone when he was "casing" the store, and then later with Bush and Cave during the robbery itself. **Both times the defendant made no effort to conceal his identity. There were places in the Lil' General Store where the victim could have been locked up by the defendants in order to prevent her from calling the police, but they elected to remove her from the store.** Immediately prior to the victim's being shot, Parker reached over to Alphonso Cave and commanded "Hand me the gun". The defendant then took the gun from Cave and exited the car and was personally present during the shooting. As the defendants fled from the [site] of the killing Parker advised Bush regarding disposing of the knife used to stab the victim. **There was a discussion in the car regarding killing Deputy Bargo who stopped them after the murder of the victim.**

(Emphasis supplied.)

In codefendant Cave's most recent penalty-phase appeal, we approved the finding of the avoid arrest aggravator, stating:

> There was little reason for the men to kidnap Slater except to kill her at their leisure in isolated surroundings where they would not be surprised or observed; and there was no other reason to kill her – she was not shot accidentally or in an escape attempt.

See Cave, 727 So. 2d at 230. The same circumstances established in *Cave* to support the avoid arrest aggravator were established in this case against Parker. Evidence was presented that there were several places in the store the defendants could have left Slater in order to make their escape. However, the defendants chose to drive Slater to a remote location where she was killed by a single gunshot to the back of the head. Parker then told Bush to get rid of the knife after the murder. Further, after the killing the defendants discussed killing Deputy Bargo when he pulled them over for a routine traffic stop.

We have affirmed the finding of the avoid arrest aggravator in similar circumstances. *See Hertz*, 803 So. 2d at 648-49 (finding the avoid arrest aggravator proper when the defendants expressed an apprehension about being arrested and were not prevented from leaving the premises once they secured the victims' property); *Knight v. State*, 746 So. 2d 423, 435 (Fla. 1998) (concluding that although the issue was contested, the defendant "had some purpose in mind in killing the victims execution style at the end of his rambling journey to a remote location," and the evidence supported the trial court's finding of the avoid arrest aggravator); *Preston*, 607 So. 2d at 409 (acknowledging that the avoid arrest aggravator may apply where a victim is abducted from the scene of a crime, transported to a different location, and killed). We find no error in the trial court's finding of the avoid arrest aggravator in this case.

D. Pecuniary Gain Aggravator

Parker's final challenge to the aggravating factors found by the trial court concerns the pecuniary gain aggravator. Parker argues that in order for this aggravator to apply, the evidence must prove that the motive for the murder, not the underlying robbery, was pecuniary gain. We disagree.

We have previously found the pecuniary gain aggravator applicable where the "murder was the culmination of a course of events that began when appellant went into a store, robbed the clerk at gunpoint, and abducted her from the store." *Copeland v. State*, 457 So. 2d 1012, 1019 (Fla. 1984). More recently, in *Card v. State*, 803 So. 2d 613, 625-26 (Fla. 2001), we rejected the defendant's argument that because the "pecuniary gain aggravator is only applicable where the State proves that pecuniary gain was the sole or dominant motive for the murder," it is inconsistent to apply both the pecuniary gain and avoid arrest aggravators. We then approved the trial court's finding of the pecuniary gain aggravator based on evidence that the defendant "stole $1,197 from the Western Union office and used some of the proceeds to repay a debt." *Id.* at 626.

In this case, Parker and his codefendants took $134 from the store and split the proceeds after the murder. The murder was the culmination of events that began when the defendants went into the store to commit the robbery and abducted Slater at gunpoint. The trial court's finding of the pecuniary gain aggravator is supported by competent, substantial evidence.

VII. Proportionality

Parker next asserts that in assigning little or no weight to the evidence in mitigation, the "trial court . . . abrogated its responsibilities." Parker also contends that his death sentence is disproportionate.

We explained in *Campbell v. State*, 571 So. 2d 415, 420 (Fla. 1990) that "the relative weight given each mitigating factor is within the province of the sentencing court," but cautioned that once a mitigating factor is found it could not be dismissed as having no weight. *See also Cole v. State*, 701 So. 2d 845, 852 (Fla. 1997) ("Deciding the weight to be given a mitigating circumstance is within the trial

court's discretion . . . ."). In *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000), we receded from *Campbell* to the extent it precluded a trial court from giving no weight to an established mitigator. We recognized that "while a proffered mitigating factor may be technically relevant and must be considered by the sentencer because it is generally recognized as a mitigating circumstance, the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case." *Id.*

In this case, the trial court found one statutory mitigator, that Parker was nineteen at the time of the crime, assigning it very little weight, and gave little or no weight to eleven of the nonstatutory mitigators presented by Parker. However, the trial court gave moderate weight to two of the nonstatutory mitigators – that Parker cooperated with law enforcement and that Parker left school to help support his family, was a good and loving son and brother, was not violent as a child, and assisted his teenage girlfriend in learning to read and drive. In addition, consistent with our decision in *Campbell*, the trial court issued a detailed sentencing order evaluating both the statutory and nonstatutory mitigation proposed by Parker. See 571 So. 2d at 419 ("When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature."). We therefore conclude that the trial court did not abuse its discretion in assigning minimal or no weight to several of the mitigating 'circumstances established by Parker.

With respect to proportionality, this Court performs proportionality review to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida

Constitution. *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991). "The death penalty is reserved for 'the most aggravated and unmitigated of most serious crimes.'" *Clark v. State*, 609 So. 2d 513, 516 (Fla. 1992) (quoting *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973)). In deciding whether death is a proportionate penalty, the Court considers the totality of the circumstances of the case and compares the case with other capital cases. *See Urbin v. State*, 714 So. 2d 411, 417 (Fla. 1998). However, this proportionality review "is not a comparison between the number of aggravating and mitigating circumstances." *Sexton v. State*, 775 So. 2d 923, 935 (Fla. 2000) (quoting *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990)).

Despite Parker's argument to the contrary, we conclude that he is equally as culpable as both Bush and Cave in Slater's murder. The evidence established that Parker gave Cave the gun before Parker, Cave, and Bush went into the convenience store, that Parker was an active participant in the robbery, and that Parker demanded the gun from Cave when they arrived at the deserted area with Slater. Finally, evidence was presented through Williams' testimony that Parker admitted committing the shooting. These actions by Parker make him as culpable as Bush and Cave in Slater's murder. In addition, Parker's death sentence in this case is proportionate when compared to other cases where the death sentence has been upheld. *See e.g., Card*, 803 So. 2d at 618-19, 629 (affirming the death sentence where evidence established five aggravators – murder committed during the course of a kidnapping, murder committed for pecuniary gain, murder committed to avoid lawful arrest, CCP, and HAC – seven nonstatutory mitigators were found by the trial court and two nonstatutory mitigators were considered and weighed by this Court); *Alston*, 723 So. 2d at 153, 162 (affirming death sentence where evidence established five aggravators—previous conviction of three violent felonies, murder committed during the course of a robbery/kidnapping

and for pecuniary gain, murder was committed to avoid lawful arrest, CCP, and HAC – and five nonstatutory mitigators, including that the defendant had a horribly deprived and violent childhood, had low intelligence and cooperated with law enforcement).

VIII. Admission Of Statements Of An Unidentified Person

In Parker's next issue on appeal, he asserts that the trial court erred by allowing the State to rehabilitate a witness with inadmissible statements of an unidentified person. Specifically, Parker argues that the State should not have been permitted to ask Deputy Timothy Bargo about a statement made by an unidentified person during his deposition. Parker contends that the statement was hearsay and violated his Sixth Amendment right of confrontation. We conclude that this argument is meritless.

A review of the record indicates that Bargo never recounted the statement made by the unidentified person. The only time the actual statement was mentioned before the jury was when the State asked Bargo: "Now if one of the defense attorneys had in some way stated Mr. Parker was the one that was helping Mr. Bush with the battery, would that have – you would have heard that and that would be in this record." When questioning resumed after Parker's objection, the State only asked Bargo to look at the statement and then asked if he recalled "that statement being" made at his deposition. Bargo responded no and the State asked if he made the statement. Bargo again responded no because he was never able to identify any of the passengers other than by the false names given to him on the morning he stopped Bush's car. Because the actual statement made by the unidentified person was never introduced into evidence, it is not subject to a hearsay or confrontation challenge, and we conclude that the trial court did not err in overruling Parker's objection.

IX. Inconsistent Triggerman Theories

Parker also contends that the State's inconsistent triggerman theories – that Cave was the shooter during Cave's trial and that Parker was the shooter during Parker's – violated his due process rights. In Parker's most recent appeal, we concluded that in using Bryant's testimony during Cave's 1993 penalty phase to show that Cave was the shooter, the State had relied not only on inconsistent positions, which the Eleventh Circuit found permissible, *see Parker*, 974 F.2d at 1578, but also on inconsistent evidence. *See Parker*, 721 So. 2d at 1151. Because this favorable evidence was suppressed by the State, we affirmed the trial court's postconviction order granting Parker a new penalty phase in order to give Parker the opportunity to present evidence of the State's inconsistent theories to the jury. *See id.*

However, we rejected Parker's argument on cross-appeal that the suppression of this evidence undermined confidence in the outcome of the guilt phase and that under *Green v. Georgia*, 442 U.S. 95 (1979), the State's use of this inconsistent evidence violated his due process rights. We concluded that Bryant's testimony went "only to a determination regarding premeditated murder," and was not relevant to a finding of felony murder, which was established by the evidence. *Parker*, 721 So. 2d at 1152. We noted:

> The underlying rationale in *Green* was that the defendant was deprived of a fair trial as to punishment **because he was not allowed to introduce evidence** that had been used by the State in a codefendant's trial to establish that the codefendant was the one who actually murdered the victim.

Id. (emphasis supplied).

Because Parker was able to present Bryant's testimony to the jury during the new penalty phase, we conclude that the State's use of inconsistent evidence during Cave's 1993 penalty phase did not violate Parker's due process rights during his de novo penalty phase.

X. Authority Of Trial Judge To Preside Over Penalty Phase

Parker's next issue on appeal involves the authority of Judge Geiger to preside over his penalty phase. Parker argues that the administrative order entered by former Chief Justice Harding appointing Judge Geiger is void because Chief Judge Kanarek requested the appointment of Judge Geiger after Judge Kanarek had recused himself from Parker's case. Parker also argues that Judge Kanarek erred in polling the judges of the Nineteenth Judicial Circuit to ascertain whether any other judge would be able to sit on Parker's case after he had granted the motion to disqualify.

At the time of Parker's penalty phase, Ridge Kanarek was the Chief Judge of the Nineteenth Judicial Circuit and was specially assigned to Parker's case by former Chief Justice Harding. When Judge Kanarek recused himself from Parker's case, he lacked the authority to make additional rulings on Parker's case. *See* § 38.10, Fla. Stat. (2003) (stating that whenever a party files a legally sufficient motion to disqualify "the judge shall proceed no further"). However, as chief judge, Judge Kanarek had a separate and distinct role as the administrative head of the circuit and, thus, an administrative duty to ascertain whether another judge of the Nineteenth Judicial Circuit could hear the case and to report this fact to the Chief Justice. *See* art. V, § 2(d), Fla. Const. ("The chief judge shall be responsible for the administrative supervision of the circuit courts and county courts in his circuit."); Fla. R. Jud. Admin. 2.050(b)(4) ("If a judge is . . . disqualified in an action . . . the chief judge or

the chief judge's designee may assign a proceeding pending before the judge to any other judge or any additional assigned judge of the same court. . . ."). When Judge Kanarek polled the other judges of his circuit he was not acting as the judge presiding over Parker's case, but rather in his administrative capacity as the chief judge of the circuit. Further, the actions taken by Judge Kanarek after his recusal were purely ministerial in nature and resulted in no substantive rulings on Parker's case. *Cf. Fischer v. Knuck*, 497 So. 2d 240, 243 (Fla. 1986) (stating that a judge has the authority to perform the ministerial act of reducing a prior ruling to writing subsequent to the filing of a motion to disqualify). Thus, we reject Parker's assertion that Judge Kanarek's actions were improper and that Judge Geiger did not have the authority to preside over Parker's penalty phase.

XI. Circumstantial Evidence Instruction

Parker next asserts that the trial court abused its discretion in denying his request for a special jury instruction on circumstantial evidence. This Court eliminated the standard jury instruction on circumstantial evidence, finding it unnecessary in light of the required instruction on reasonable doubt. *See In re Standard Jury Instructions in Criminal Cases*, 431 So. 2d 594, 595 (Fla. 1981). Although the trial court can give the circumstantial evidence instruction, we have "expressly approved courts which have exercised their discretion and *not* given the instruction." *Monlyn v. State*, 705 So. 2d 1, 5 (Fla. 1997). We conclude that the trial court did not abuse its discretion in this case in denying Parker's request.

XII. Eighteen Years Between Indictment And New Penalty Phase

Parker asserts that eighteen years between the indictment and the new penalty phase in his case constitutes cruel and unusual punishment under the Eighth Amendment

to the United States Constitution and violates his due process rights because persons who were available to provide mitigation evidence at the original trial were no longer able to testify at the penalty phase. We have previously rejected the argument that a seventeen-year span between a defendant's arrest and his second penalty phase was cruel and unusual punishment. *See Hitchcock v. State*, 673 So. 2d 859, 863 (Fla. 1996). Similarly, we conclude that no constitutional violation occurred as the result of the delay in Parker's case.

XIII. Apprendi and Ring

Finally, Parker argues that under the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), the Florida death penalty statute violates the Sixth Amendment of the United States Constitution. However, in addition to a conviction for first-degree murder, Parker was convicted by a unanimous jury of kidnapping and robbery. One of the aggravating factors found by the trial court was that Parker committed the murder in the course of a kidnapping. We recently denied relief on this issue in a direct appeal where the murder occurred in the course of the enumerated felonies of robbery and kidnapping, which were supported by separate guilty verdicts. *See Caballero v. State*, 851 So. 2d 655, 663-64 (Fla. 2003). Parker is likewise not entitled to relief.

CONCLUSION

Having considered and rejected Parker's challenges to his sentence, we affirm the death sentence in this case.

It is so ordered.

APPENDIX B – ORDER OF THE SUPREME COURT OF FLORIDA DENYING APPELLANT'S MOTION FOR REHEARING DATED WEDNESDAY, APRIL 28, 2004.

SUPREME COURT OF FLORIDA

WEDNESDAY, APRIL 28, 2004

CASE NO.: SC01-172
Lower Tribunal No.: 82-352 CFC

J.B. PARKER vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

ANSTEAD, C.J., and WELLS, PARIENTE, LEWIS, QUINCE, and CANTERO, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

[Seal of Supreme Court of the State of Florida]

kb
Served:

LAWRENCE MIRMAN
DAVID M. LAMOS
DEBRA RESCIGNO
HON. DWIGHT LUTHER GEIGER, JUDGE
HON. MARSHA STILLER-EWING, CLERK

APPENDIX C – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DECIDED OCTOBER 6, 1992

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

No. 90-3901.

J.B. PARKER, an individual,
Petitioner-Appellant,

v.

Harry K. SINGLETARY, Secretary, Florida Department of Corrections,
Respondent-Appellee.

Oct. 6, 1992.

JUDGES: Before TJOFLAT, Chief Judge, FAY, Circuit Judge, and CLARK, Senior Circuit Judge.
OPINION BY: PER CURIAM

OPINION: J.B. Parker was convicted and sentenced to death for the murder of a convenience store clerk that occurred on April 27, 1982 in Stuart, Florida. His conviction and sentence were upheld by the state courts on direct appeal[1] and in several post-conviction relief and habeas corpus

[1] *Parker v. State*, 476 So. 2d 134 (Fla.1985); *see also id.* at 135-37 (recounting events surrounding murder and trial).

proceedings.[2] The district court refused to grant habeas corpus relief on any of the issues raised by Parker.[3] We affirm the district court's denial of relief on all of Parker's claims.

Unless discussed otherwise, the district court found (and we agree) that Parker's claims necessary to a resolution of this appeal were exhausted and not procedurally defaulted in the state courts.

I.

Parker argues that the district court erred in refusing to grant an evidentiary hearing. Parker claims that the state court evidentiary hearing on his first motion for post-conviction relief was not full and fair. After Parker filed his motion for post-conviction relief on December 3, 1987, the state court scheduled a hearing on Parker's motion for February 11, 1988. Due to the state court's error in incompletely addressing the hearing notice, Parker's counsel did not receive notice of the hearing until February 9, 1988. The state court refused to continue the hearing. Parker now argues that this refusal prevented him from fully developing evidence concerning the ineffectiveness of Parker's representation during the taking and admission of one of his statements and during the sentencing phase of the trial.[4]

We agree that through no fault of his own Parker was put in the unfortunate position of having to locate and schedule witnesses on two days' notice. Our review of the hearing that was held in the state court convinces us that Parker was

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[2] *Parker v. State*, 542 So. 2d 356 (Fla.1989); *Parker v. Dugger*, 550 So. 2d 459 (Fla.1989).

[3] R3-56 (district court opinion and order, Aug. 29, 1990).

[4] *See* blue brief, at 17.

nevertheless able to overcome his lack of notice. The hearing lasted for two days. During this time, Parker was able to call several witnesses as to the mitigation evidence that Parker's trial counsel could have presented. Parker produced one witness who testified concerning the circumstances of Parker's statement. Parker himself testified. Parker was able to introduce over twenty affidavits. The state called the prosecuting and defense attorneys, whom Parker was able to cross-examine. Also, the state court judge offered to hold a second hearing "[if] we are unable to finish the hearing because you have additional matters that you wish to present and you cannot have the witnesses here today or tomorrow."[5] Parker apparently never accepted the judge's offer.

Some evidence was taken on all of the issues raised by Parker. Moreover, ample evidence was in the record concerning Parker's statement, the primary issue upon which Parker seeks relief.[6] Given these circumstances, we conclude that Parker received a hearing in state court that was "full and fair."[7]

II.

Parker's principal claim on appeal centers around the taking of his first statement by the police. Parker argues that his Fifth and Sixth Amendment rights to counsel were violated

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[5] R2-17-Exh. 17, at 12.

[6] *But cf. Streetman v. Lynaugh*, 812 F.2d 950, 958 (5th Cir.1987) ("The facts regarding the voluntariness of Streetman's various statements were not adequately developed at the state evidentiary hearing.").

[7] *Townsend v. Sain*, 372 U.S. 293, 318, 83 S. Ct. 745, 760, 9 L. Ed. 2d 770 (1963); *see Thomas v. Zant*, 697 F.2d 977 (11th Cir.1983) (discussing standards for obtaining evidentiary hearings under *Townsend* and 28 U.S.C. § 2254(d)); *cf. Smith v. Dugger*, 840 F.2d 787, 796 (11th Cir.1988) (rejecting claim that time constraints on counsel prevented full and fair hearing in state court).

when the police took his statement without acceding to his repeated requests for counsel.

A. *Facts*

Parker was apprehended by the police at 2:30 a.m. on May 5, 1982 and was brought to the State Attorney's Office in Fort Pierce, Florida for questioning.[8] He was taken to a small room by several detectives. The detectives played a tape of co-defendant John Earl Bush's confession, in which Bush stated that Parker shot the victim.[9] One of the detectives informed Parker that, in Parker's words, he "might as well go ahead and tell 'em about what happened cause he had it all on tape, they already know about it."[10]

Parker refused to make a statement at that time and started to leave the State Attorney's Office. While leaving, he saw his mother and other acquaintances. He believed they were attempting to obtain an attorney for him.[11] Before leaving or talking with his mother, Parker agreed to accompany a detective to the Martin County Sheriff's Office for further questioning.[12] Once there, Parker was arrested and placed in a cell.[13] Subsequently, a magistrate came to the cell to explain the charges to Parker, and Parker told the magistrate that he wanted to hire his own attorney.[14] This statement is supported by the magistrate's certificate of probable cause,

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[8] Transcript of Evidentiary Hearing on Motion for Post-Conviction Relief, Feb. 12, 1988, R2-17-Exh. 18, at 195.

[9] *Id.* at 197.

[10] *Id.* at 196.

[11] *Id.* at 198.

[12] *Id.* at 199.

[13] *Id.*

[14] *Id.* at 200.

dated May 5, 1982, which notes, "This Def. indicated he was going to try to hire his own atty!"[15] Afterwards, Parker was allowed to use the telephone to attempt to contact his mother to find out whether she had obtained an attorney for him. He could not contact her.[16] However, he spoke with his sister and asked her to find out about his mother's efforts to obtain an attorney.[17]

That afternoon Parker asked to see the Sheriff.[18] It is unclear whether Parker made this request in order to ask the Sheriff for permission to try to contact his mother again or whether Parker wanted to make a statement to the Sheriff. Sheriff James Holt did not allow Parker to call his mother, but brought him into a small room.[19] The Public Defender's Office had already entered an appearance for Parker at this time and had sent a letter asking the Sheriff's Office not to speak with Parker without contacting it first.[20] Sheriff Holt called Elton Schwarz, the Public Defender. Schwarz sent over Steven Greene, a student intern who had not been admitted to the bar, to consult with Parker. Schwarz had already determined that his office had a conflict in representing Parker (due to its representation of a co-defendant).[21] Schwarz therefore instructed Greene not to discuss the details of any possible statement with him but

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[15] R2-17-Exh. 10, at 1550.

[16] Transcript of Evidentiary Hearing on Motion for Post-Conviction Relief, Feb. 12, 1988, R2-17-Exh. 18, at 200.

[17] *Id.* at 201.

[18] *Id.* at 202.

[19] *Id.* at 203.

[20] R2-17-Exh. 10, at 1527.

[21] *Id.* at 1534.

only to tell Parker not to confess if that was what Parker planned to do.[22]

Greene arrived shortly, and Parker and Greene were left alone to talk. Parker testified, "[Greene] told me that he was sent over from the Public Defender's Office to represent me. And I told Mr. Greene -- I asked Mr. Greene rather could I make a phone call cause I didn't know who he was until I be told, and I told him that I wanted to call my mother to see had she obtained a lawyer for me, which I told him this several times. And he told me that he was my attorney... He also told me that I should not say anything...."[23] Greene did not mention his instructions from the Public Defender not to discuss the substance of any statement Parker might make or that Parker could be sentenced to death even if he was not the triggerman in the murder.[24] Parker testified that he would not have given a statement had he known these facts.[25]

Greene's deposition supports Parker's version of their conversation. Greene deposed:

During our private conversation, Mr. Parker told me several times that he wanted to call his mother in order to learn whether she had hired a lawyer for him. Mr. Parker appeared to have a specific lawyer in mind, and it was clear to me that he wanted that person to represent him, rather than myself. I

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[22] *See* Appendix to Defendant's Motion to Vacate Judgment and Sentences, R2-17-Exh. 24, at 501 (Greene deposition) ("Mr. Schwartz instructed me in connection with that meeting [with Parker] not to go into the facts of the case with Mr. Parker because the Public Defender's Office was conflicted and could not represent Mr. Parker.").

[23] Transcript of Evidentiary Hearing on Motion for Post-Conviction Relief, Feb. 12, 1988, R2-17-Exh. 18, at 204.

[24] *Id.* at 205.

[25] *Id.* at 206.

understood from Mr. Parker that he had unsuccessfully asked the Sheriff for permission to call his mother and ask about the lawyer he believed she was retaining to represent him.[26]

However, the attorney who was eventually appointed to represent Parker testified that Parker never mentioned to him that he had called in the Sheriff to ask to use the telephone and that Parker had maintained that he had simply wanted to tell the Sheriff his side of the story.[27] The Sheriff testified at the suppression hearing that Parker had wanted to talk, but the Sheriff was not queried as to whether Parker also wanted to make a phone call to speak with his mother.[28]

After Parker and Greene finished their conversation, the Sheriff and other detectives returned. A tape-recorded transcript was made of the subsequent events and was played at Parker's trial:[29]

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[26] Appendix to Defendant's Motion to Vacate Judgment and Sentences, R2-17-Exh. 24, at 502; *see also* Transcript of Evidentiary Hearing on Motion for Post-Conviction Relief, Feb. 11, 1988, R2-17-Exh. 17, at 117-18, 137.

[27] Transcript of Evidentiary Hearing on Motion for Post-Conviction Relief, Feb. 11, 1988, R2-17-Exh. 17, at 84:

Q Why didn't you call the Defendant to the stand ... to explain to the Judge, "That I really wanted an attorney and that I had asked my mother and I really wanted the Sheriff to come in just so I could get an attorney."

A Because that was contrary to what Mr. Parker had told me about the statement. His position was and what he told me and he never changed the position was that he wanted to talk to the Sheriff. He wanted to tell the Sheriff his side of the story.

[28] *See* Transcript of Motion to Suppress, Sept. 3, 1982, R2-17-Exh. 1, at 8.

[29] Parker has prepared a new transcription of the tape that he asserts to be more accurate than the trial transcript. Although we have quoted from the trial transcript in the text, we have footnoted where Parker's transcript materially differs.

Holt: "This is Sheriff Holt, on May the 5th, 1982, at approximately 4:26 p.m. Just a few minutes ago I was summoned to the county jail by Art Jackson, who told me that an inmate by the name of Parker was requesting to see me right away. I come to the jail to see if Mr. Parker was sick, what his problem might be. At that time he told me he wanted to explain to me and to tell me exactly what went on in the Slater case. At that time I stopped him and told him that the Judge today had appointed the Public Defender to represent them; I had received notice in writing from the Public Defender's officer that I could not talk to him without notifying the Public Defenders. At that time he told me to notify them, that he still wanted to talk to me. I called the Public Defender's office and talked to Mr. Schwarz for a few minutes, told him the problem. About that time Mr. Greene come on the phone. I told Mr. Greene what was happening, and he says, T'll be right over.' A few minutes later Mr. Greene appeared at the jail, went back and talked to Mr. Parker alone, by himself. He come out and told me that he could not keep him from talking to me, the man still insisted on talking to me and telling me exactly what had happened, over his objection. And now we're in the nurse's examination room of the Martin County jail. Present is myself, Sheriff Holt, Deputy-sergeant Forte, detective department; Deputy-sergeant Miller, Martin County detective department; Public Defender Mr. Greene; and Mr. Parker. What is your first name."

Parker: "J.B."

Holt: "J.B. Parker. Mr. Greene, is there anything you want to put on this tape, just go ahead."

Greene: "Yes. Sheriff Holt, just for the record, Mr. Greene speaking, employed by the Public Defender's office in Stuart, Florida, and on behalf of Mr. Parker, who we have had a temporary appointment to just this morning from Judge

Cianca, I would like to say on the record that Mr. Parker is now speaking to the detectives, or will be speaking to detectives from the sheriff's office in Martin County, and I have advised Mr. Parker not to speak to the officers, not to say anything to the detectives, not to say anything to anybody involved in this case. Over my objection Mr. Parker will be speaking on tape today to the sheriffs involved in this case. I have explained to Mr. Parker that anything that he says might and will be used against him in court. He has confirmed with myself, Mr. Greene, that he wants to go ahead and speak anyway and clear his conscience. I told him I didn't think it was a smart thing to do, he told me he wanted to speak anyway, and therefore this interview is going forward even though it is over my objection."

Holt: "Thank you, Mr. Greene. Mr. Parker, I know you've been advised of your rights many, many times prior to this, but this is a rights form that I wish - I'll read it to you and you can read it, and I wish you would sign, before you make any statement of any kind."

Parker: "You say before?"

Holt: "Will one of you all read it, I don't have my glasses with me."

Forte: "Now, Mr. Parker, Detective Forte; I'm going to read you your rights form. Before we ask you any questions you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to speak to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford an attorney, one will be appointed for you before questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until

you speak to an attorney. Do you understand what I just read to you? Okay."

Holt: "Do you read, J.B.? Read it and sign it."

Forte: "I made an X over there, Mr. Parker, where I would like for you to sign it."

Holt: "J.B., that's not admitting to anything. That's advising you of your rights, and we want you to understand you do have -- what rights that you do have, although your attorney is here present and he has explained it to you prior to this."

Greene: "Mr. Parker, do you understand those rights that you're reading now?"

Parker: "Yes."

Greene: "You understand what you're reading and what you're signing? Do you wish to go ahead and sign that?"

Parker: "I want to see if my mom got me a lawyer yet. I don't know, I ain't got in contact with her yet."

Greene: "Well, I'm acting as your attorney today."

Parker: "I just want to get this off my mind."

Holt: "Okay J.B., if you'll -- "

Parker: "Talk."

Holt: "You go ahead and sign that before I ask you any questions. That's not admitting to anything, it's just that you understand what you have read there and what has been read to you."

Forte: "You see the X right there, Mr. Parker, where I made the X? Okay, sign your legal name, please."

Greene: "Do you understand that by signing that, you're waiving your right to remain silent?"

Parker: "Do I have to sign this to talk to you all?"

Holt: "No, sir. You can still talk to us without it."

Greene: "Well, you can -- they want you to sign that there because it states right here that you're waiving your rights. Do you understand your rights here?"

Parker: "Yes, sir, the reason I was wanting one here."[30]

Greene: "Excuse me?"

Parker: "That is why I was wanting my lawyer. I want to see if my mom has a lawyer so I can have him with me."[31]

Greene: "Well, that's why I'm representing you today. Do you wish to make no statements until you get your mother to get another lawyer other than myself to represent you?"

Parker: "I was waiting on -- I want my mom to get me a lawyer."[32]

Holt: "Okay, J.B. -- "

Parker: "Another one."

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[30] "Right here sir, the reason I was wanting one here."

[31] "Right here sir, the reason I was wanting a lawyer at this time. I want to see if my mom have me a lawyer so I can have him with me."

[32] "I was waiting on -- I was waiting on my mom to get me a lawyer."

Holt: "I think I understand where you're coming from. You asked me to come over and that's why I'm here. I went back and explained to you that you did have a lawyer appointed for you. Nobody is going to make you make a statement. You asked me could you talk to me and explain to me just exactly what happened, that you felt like that there was something being put on you that wasn't right. You wanted to tell me the story just like it was. Am I correct in that?

Parker: "Yes, sir."

Holt: "Okay. You can still give me a statement without signing that. All that says right there is that you understand that you don't have to. Do you still wish to give us a statement at this time?

Parker: "Yes, sir."

Holt: "Okay, we'll continue on with it now. The two detectives that are here will be, you know it's on tape, and they will be jotting down information as you come -- talk to us. If you would in your own words just tell me what you want to tell me."

Parker: "I want to tell you I didn't kill that girl."[33]

The subsequent statement was introduced during the state's case-in-chief in the guilt phase of Parker's trial.

At his state court post-conviction relief hearing, Parker testified that he gave the statement "because I asked Mr. Greene, I asked Sheriff Holt ... could I make a phone call and I ... never got any response to my question. And I felt that it was useless to go on asking questions. No one -- no one

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[33] R2-17-Exh. 5, at 774-80.

would let me -- allow me to make a phone call."[34] And Parker testified that the Sheriff's reference to Parker's feeling that "there was something being put on you that wasn't right" was the immediate circumstance that prompted Parker to give the statement.[35]

Greene also deposed:

At the time that I attempted to explain to Mr. Parker that I was appointed to represent him, I believed that I was fulfilling the role assigned to me by the Public Defender. I now realize that, by asserting that I was his attorney, I may have contributed to the denial of Mr. Parker's right to an attorney of his choice, and his right to an attorney who would not be constrained by the conflict of interest with which I was presented. I may have misled Mr. Parker by telling him that I was representing him when the circumstances clearly indicated that he did not desire my services and was obviously trying to assert his right to some other attorney.[36]

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[34] Transcript of Evidentiary Hearing on Motion for Post-Conviction Relief, Feb. 12, 1988, R2-17-Exh. 18, at 208.

[35] *See id.* at 209-10:

Q And where [the transcript] says later that ... Mr. Sheriff Holt is stated to have told you that you felt like there was something being put on you that wasn't right. How did you react to that statement?

. . .

A It was the statement that Bush had made.

Q And how did that affect you?

A He asked me that question Bush's statement was the first thing that came to my mind... And it was like that ... and from that point I stated yes sir. And he asked me another question and I believe I proceeded to tell him what happened that night.

[36] Appendix to Defendant's Motion to Vacate Judgment and Sentences, R2-17-Exh. 24, at 503.

On Parker's cross-examination at the post-conviction relief hearing, the state brought out the fact that, due to his prior brushes with the law, Parker was aware of the importance of having an attorney present.[37] The state pointed out that Parker did not inform his trial attorney of Parker's claim that the Sheriff refused his requests to make a telephone call.[38] Parker admitted that he had wanted to get the events of the crime off his mind.[39]

These facts indicate that Parker may well have initially contacted Sheriff Holt to request to call his mother about an attorney. This interpretation is certainly consistent with the statements Parker made in his taped statement. Parker simultaneously seems to have asked to tell his side of the story, which request is also consistent with the statement. However, even if Parker initially contacted Sheriff Holt *only* in order to make a statement, our precedents demonstrate that Parker's subsequent and repeated requests for a different attorney make the resulting statement inadmissible.

B. *Law*

The admission of Parker's statement raises three questions for our consideration: (1) Did the presence of the intern Greene satisfy Parker's right to counsel when he gave the statement? (2) If not, did Parker sufficiently request to be represented by different counsel? and (3) If so, did Parker waive his right to counsel?

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[37] Transcript of Evidentiary Hearing on Motion for Post-Conviction Relief, Feb. 12, 1988, R2-17-Exh. 18, at 219.

[38] *Id.* at 226.

[39] *Id.* at 228; *see also id.* at 235-37.

Appendix C

1. *The Effect of Greene's Presence*

Parker argues that his right to an attorney under the Fifth and Sixth Amendments and *Miranda v. Arizona*[40] was violated by the taking of his statement by the Sheriff. An initial question we must address is whether the presence of the student intern Greene provided Parker all the counsel he was entitled to, whatever his requests for other counsel. Greene's presence creates a factual situation not covered precisely by prior cases.

Regardless of whether Parker's Sixth Amendment right to counsel had attached at the time of the statement,[41] Parker's repeated requests for counsel established his *Miranda*-Fifth Amendment right to counsel.[42] However, the counsel that was actually provided to Parker had not been admitted to the bar and was disqualified from representing Parker by his office's

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[40] 384 U.S. 436, 86 S. Ct. 1602 (1966).

[41] This issue does not seem to have been addressed previously in this case. The state does not argue that Parker's Sixth Amendment right had not attached, and the evidence seems fairly clear that the right had attached, because Parker had apparently appeared before a magistrate prior to giving the statement. *See supra* text accompanying notes 14-15; *see also Fleming v. Kemp*, 837 F.2d 940, 948 (11th Cir.1988) (finding similar proceedings before a Justice of the Peace to be an "adverse judicial proceeding" and to initiate the Sixth Amendment right to counsel), *cert. denied*, 490 U.S. 1028, 109 S. Ct. 1764, 104 L. Ed. 2d 200 (1989); *Witt v. Wainwright*, 714 F.2d 1069, 1073 (11th Cir.1983), *modified on other grounds*, 723 F.2d 769 (11th Cir.1984), *rev'd on other grounds*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985). However, it is not necessary to the resolution of this case for us to determine whether a Sixth Amendment right had attached at the time of the statement to the Sheriff, because any Sixth Amendment violation would be subject to the same harmless error analysis we conduct below. *See infra* Part II.C.

[42] *See infra* Part II.B.2. (discussing Parker's requests for counsel). pp. 141-142.

representation of a co-defendant. The fact that Greene was not a lawyer is a sufficient (if formalistic) reason to hold that Parker's Fifth Amendment right to counsel was not honored.[43]

Even if Greene is viewed as the practical equivalent of an attorney, he labored under a conflict that prevented him from giving Parker competent advice. Although the harm caused by a conflict of interest is typically difficult to measure because the harm "is in what the advocate finds himself compelled to *refrain* from doing,"[44] we have specific evidence of what Greene refrained from doing in this case. Schwarz, the Public Defender, told Greene not to discuss the facts of the case or the content of Parker's proposed statement with Parker. Greene abided by these instructions. Therefore, it was impossible for Greene to have known whether it was in Parker's interest to make a statement. If Parker was going to make a completely exculpatory statement, it might have been in his interest to talk. Moreover, Parker was clearly in need of legal advice: He almost surely did not know about the felony murder doctrine when he made his decision to admit that he participated in the robbery but did not actually murder. The state argues that Parker would have talked anyway -- that any other lawyer would have similarly advised Parker to keep silent -- but Parker's repeated requests for another lawyer and the fact that Greene could not fully counsel Parker cast great doubt on this argument. Instead of Greene, the Public Defender's office might as well have sent a tape-recording of a voice saying, "Do not talk" to Parker, and the recording would no more have satisfied Parker's right to be counseled by an attorney. As the Supreme Court has

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[43] Greene never informed Parker that he was not an attorney, nor did Greene fulfill the written notice requirements of the intern program. *See* R3-56-23 (district court opinion).

[44] *Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S. Ct. 1173, 1182, 55 L. Ed. 2d 426 (1978) (emphasis in original).

remarked in the Sixth Amendment context, "the mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."[45] It is abundantly clear that there existed an actual conflict of interest in this case that had an adverse effect on Greene's performance.[46]

Of course, it would have been possible for Parker to have waived his right to conflict-free counsel. "This court has held that a defendant may waive the right to conflict-free counsel as long as the waiver is knowingly and intelligently made. To be knowing and intelligent, the defendant must be told (1) that a conflict of interest exists; (2) the consequences to his defense from continuing with conflict-laden counsel; and (3) that he has a right to obtain other counsel."[47] But Parker was never informed that Greene had a conflict of interest that prevented his office from representing Parker. And Greene and Holt effectively told Parker that he did not have the right to contact other counsel, by their repeated assertions that Greene was Parker's attorney. Parker therefore did not knowingly and intelligently waive his right to conflict-free counsel.

2. *Parker's Requests for Other Counsel*

Given that Greene's mere presence did not satisfy Parker's right to have counsel present when he gave the statement, we must determine whether Parker in fact requested different counsel. The Supreme Court has interpreted the Fifth

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[45] *Holloway*, 435 U.S. at 490, 98 S. Ct. at 1181 .

[46] *See generally Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) (describing standard for relief in conflicted counsel cases); *McConico v. Alabama*, 919 F.2d 1543 (11th Cir.1990) (same).

[47] *Duncan v. Alabama*, 881 F.2d 1013, 1017 (11th Cir.1989).

Amendment (in *Miranda*) as requiring that all questioning must cease during a custodial interrogation when an accused asserts his right to counsel.[48]

The transcript of the statement reveals that Parker requested a different lawyer five times prior to making his statement.[49] n49 Subsequently, the student Greene twice asserted that he was Parker's lawyer.[50] Finally, Sheriff Holt took over and told Parker that Greene was Parker's lawyer.[51] Holt then reminded Parker of the reason Parker wanted to talk, because "you felt like that there was something being put on you that wasn't right. You wanted to tell me the story just like it was." Parker gave a statement, but he never indicated that he wanted to give a statement without a different lawyer present, and he never signed the waiver of rights form that Sheriff Holt proffered him. Therefore, Parker clearly asserted his right to counsel.[52]

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[48] *See Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981).

[49] (1) "I want to see if my mom got me a lawyer yet. I don't know, I ain't got in contact with her yet." (2) "Yes, sir, the reason I was wanting one here." (3) "That is why I was wanting my lawyer. I want to see if my mom has a lawyer so I can have him with me." (4) "I was waiting on -- I want my mom to get me a lawyer." (5) "Another one."

[50] (1) "Well, I'm acting as your attorney today." (2) "Well, that's why I'm representing you today."

[51] "I went back and explained to you that you did have a lawyer appointed for you."

[52] *See Cannady v. Dugger*, 931 F.2d 752, 755 (11th Cir.1991) (holding that statement, "I think I should call my lawyer" was an unequivocal request for counsel); *Fleming*, 837 F.2d at 947 (holding that a defendant's assertion that he would get his own attorney rather than rely on an appointed one was an invocation of the right to counsel).

Even if Parker's five requests for different counsel could be said to be equivocal,[53] Sheriff Holt failed to clarify Parker's requests prior to continuing with the statement. "When a defendant makes an equivocal request for an attorney during a custodial interrogation, 'the scope of that interrogation is immediately narrowed to one subject and one only. *Further questioning thereafter must be limited to clarifying that request* until it *is* clarified.'"[54]

Although Greene initially attempted to clarify whether Parker wanted to wait to talk until another lawyer had been procured,[55] Holt's subsequent statements to Parker were not clarification but were argumentation. Parker stated that he did not regard Greene as his attorney and that he wanted "another one." Holt flatly asserted that Greene was Parker's attorney and continued the questioning. Holt's declaration did nothing to elucidate Parker's request and indeed confused Parker in the exercise of his rights.[56] In a somewhat comparable situation, we have noted that the "limited inquiry permissible after an equivocal request for legal counsel may not take the form of an argument between interrogators and suspect...."[57] Moreover, Holt's not-so-subtle reminder that

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[53] *Cf. Owen v. Alabama*, 849 F.2d 536, 539 (11th Cir.1988) (finding that statement that "I think I'll let y'all appoint me one" was at least an equivocal request for counsel).

[54] *Id. (quoting Thompson v. Wainwright*, 601 F.2d 768, 771 (5th Cir.1979) (emphasis in original)).

[55] "Do you wish to make no statements until you get your mother to get another lawyer other than myself to represent you?"

[56] *See Christopher v. Florida*, 824 F.2d 836, 842 (11th Cir.1987) ("The rule ... permits 'clarification,' not questions that, though clothed in the guise of 'clarification,' are designed to, or operate to, delay, confuse, or burden the suspect in the assertion of his rights."), *cert. denied*, 484 U.S. 1077, 108 S. Ct. 1057, 98 L. Ed. 2d 1019 (1988).

[57] *Thompson*, 601 F.2d at 772.

one of Parker's co-conspirators had implicated him may have intimidated Parker into foregoing the advice of counsel and giving the statement.[58] It is clear that Holt should have stopped the questioning to allow Parker to contact other, conflict-free counsel prior to continuing with the taking of the statement. This is because *Miranda* requires that, once the right to counsel has been exercised, "the interrogation must cease until an attorney is present."[59] Once an impartial attorney is present, we might add.

3. *Waiver of the Right to Counsel*

The district court denied relief in this case because it found that Parker had waived his right to counsel by giving the statement.[60] But the Supreme Court held in *Edwards,* "When an accused has invoked his right to have counsel present

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[58] *See Towne v. Dugger*, 899 F.2d 1104, 1110-11 (11th Cir.) ("[The officers] admit that they did nothing to clarify whether Towne wanted to have an attorney present... Instead, [one officer] further intimidated Towne by making accusatory statements...."), *cert. denied*, --- U.S. ----, 111 S.Ct. 536, 112 L.Ed.2d 546 (1990); *United States v. Cherry*, 733 F.2d 1124, 1131 (5th Cir.1984) ("After Cherry had made an equivocal request for counsel, Cherry did not volunteer his confession; rather, he responded to questions posed by his interrogators. In *Thompson* the questioners ... improperly used a discussion of the right to counsel as a means to elicit an incriminating statement. Here, the agents exceeded the transgression in *Thompson* by asking Cherry about the murder itself to coax a confession from Cherry.").

[59] *Miranda*, 384 U.S. 436, 474, 86 S. Ct. 1602, 1627, 16 L. Ed. 2d 694 .

[60] *See* R3-56-19 ("The Court finds that when the petitioner seemed to hesitate and request to speak with his mother, the sheriff stopped asking petitioner to sign a waiver form, told him that no one would make him give a statement, and inquired as to whether he actually wanted to make a statement. Petitioner indicated that he did want to make the statement and went ahead and told his side of the story. The Court finds that petitioner voluntarily and freely made his statement. The Court finds that petitioner made a knowing, intelligent, and voluntary waiver of his right to remain silent.").

during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights."[61] And the district court seems to have confused the issue of whether there was a knowing and intelligent waiver of rights with the issue of whether the statement was voluntary. The fact that Parker *voluntarily* gave the statement without different counsel does not at all mean that he *knowingly and intelligently* waived his right to conflict-free counsel.[62]

The inquiry that the district court should have conducted to determine whether a "knowing and intelligent" waiver of Fifth Amendment rights was made focuses on the suspect's comprehension of the rights he is relinquishing. The Supreme Court has written, The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. The Fifth Amendment's guarantee is both simpler and more fundamental: A defendant may not be compelled to be a witness against himself in any respect. The *Miranda* warnings protect this privilege by ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue

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[61] *Edwards*, 451 U.S. at 484, 101 S. Ct. at 1884-85 (footnote omitted).

[62] *See Edwards*, 451 U.S. at 482, 101 S. Ct. at 1884 ("Waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege...."); *Miller v. Dugger*, 838 F.2d 1530, 1538 (11th Cir.) ("The Supreme Court [in *Edwards*] could not have stated more clearly that an uncounselled statement must be both voluntary and made after a knowing and intelligent waiver of the Miranda rights to be admissible."), *cert. denied*, 486 U.S. 1061, 108 S. Ct. 2832, 100 L. Ed. 2d 933 (1988); *see also United States v. Gaddy*, 894 F.2d 1307, 1312 (11th Cir.1990); *Dunkins v. Thigpen*, 854 F.2d 394, 398-99 (11th Cir.1988), *cert. denied*, 489 U.S. 1059, 109 S. Ct. 1329, 103 L. Ed. 2d 597 (1989).

talking at any time. The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him.[63]

In this case, Parker never signed the waiver of rights form offered to him by Sheriff Holt, nor did he otherwise indicate that he was knowingly and intelligently waiving his rights. Parker did not know of Greene's status or the limitations of his representation. Indeed, Sheriff Holt and Greene misrepresented Greene's true status to Parker. Under these circumstances, Parker could not have knowingly and intelligently waived his Fifth Amendment right "to talk only with counsel present."[64]

Because Greene's presence did not satisfy Parker's right to counsel, because Parker clearly did request other counsel, and because Parker did not knowingly and intelligently waive his right to conflict-free counsel, the resulting statement was inadmissible.

C. *Harmless Error*

Our conclusion that Parker's statement was taken in violation of his Fifth Amendment right to counsel requires us to decide whether the admission of the statement was harmless error.[65]

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[63] *Colorado v. Spring*, 479 U.S. 564, 574, 107 S. Ct. 851, 857-58, 93 L. Ed. 2d 954 (1987) (citations omitted).

[64] *Id.*, 479 U.S. at 574, 107 S. Ct. at 857; *cf. Thompson*, 601 F.2d at 770-72 (finding *Miranda* violation where police misled suspect as to the consequences of talking to an attorney).

[65] *See Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967). ("Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."); *Null v. Wainwright*, 508 F.2d 340, 343 (5th

We find that the effect of the error was harmless beyond a reasonable doubt.

1. *Presumed Prejudice*

As an initial matter, we address Parker's argument that prejudice must be presumed as a consequence of his representation by conflicted counsel.[66] Parker makes this argument as part of a separate claim concerning the effectiveness of Greene's representation.[67] The district court found that this claim was only exhausted as part of other claims in the state courts.[68] Assuming Parker's Sixth Amendment right to counsel had attached,[69] because Greene only represented Parker for the brief period of time surrounding the taking of Parker's first statement, we find that it is not appropriate to consider this argument as a separate claim for ineffective assistance of counsel. As opposed to the typical claim of deficient overall trial assistance arising out of a conflict in counsel's representation, it is simple to determine the precise prejudice that arose from Greene's fleeting but conflicted representation: the improper

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Cir.) ("Though some rights are so basic that their violation does not admit of harmless error treatment, the Fifth Amendment as embodied in *Miranda's* procedural safeguards is not one of them." (footnote omitted)), *cert. denied*, 421 U.S. 970, 95 S. Ct. 1964, 44 L. Ed. 2d 459 (1975).

[66] *See Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). ("Prejudice is presumed when counsel is burdened by an actual conflict of interest... Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" (citation omitted)).

[67] *See* blue brief, at 34 ("Point III: The Public Defender Deprived Parker of His Sixth Amendment Right to Non-Conflicted Counsel and Effective Counsel").

[68] *See* R3-56-19-24.

[69] *See supra* note 41.

admission of Parker's statement to the Sheriff.[70] We therefore refuse to presume prejudice as a result of Greene's ineffective assistance.[71]

2. *Guilt Phase*

Whether the admission of the statement was harmless error at the guilt phase of the trial is a difficult question. Much of the state's case rested on Parker's three statements. The first is the original statement now at issue; the second is the statement Parker made to the police when he agreed to show them where the body of the victim was deposited;[72] and the third is the confession Parker made to the girlfriend of one of Parker's co-defendants. (Parker also testified at trial and admitted to being in the company of the others and going into

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[70] *See supra* text accompanying note 44.

[71] It is unnecessary for us to address Parker's additional argument that he was actually prejudiced by Greene's representation. The *Strickland v. Washington* prejudice test essentially merges into the harmless error analysis we conduct on the statement issue.

[72] Parker argues on appeal that this second statement was also taken in violation of his right to counsel. *See* blue brief, at 23 n. 13. However, the state argued before the district court that this claim was procedurally defaulted because it was not raised on direct appeal. *See* R2-39-7-8. In reply, Parker argued that the claim was adequately raised on direct appeal when he challenged the admission of the first statement. *See* R2-40-7 n. 4. Parker further stated, "If, however, this Court were to conclude that Parker's claim with respect to the [second statement] is unexhausted, Parker will voluntarily waive that claim." *Id.* The district court did not discuss the issue of the second statement. Our review of Parker's brief on direct appeal indicates that Parker failed to raise this issue in any form. *See* R1-2-App. 7 (direct appeal initial brief); R1-2-App. 8 (direct appeal reply brief). Parker thereby abandoned his objections to the second statement and is procedurally barred from challenging its admission in federal court. *See generally Presnell v. Kemp*, 835 F.2d 1567, 1574-75 (11th Cir.1988) (discussing rationale underlying "abandoned objection" procedural default rule), *cert. denied*, 488 U.S. 1050, 109 S. Ct. 882, 102 L. Ed. 2d 1004 (1989).

the store, but we do not believe that he would have testified but for the introduction of the first statement.)

The original statement was quite complete. The statement described the actions of the defendants as they drove around the vicinity of Stuart, Florida. Parker claimed that, when he first learned that co-defendant Bush wanted to rob a store, he protested and asked to be taken home. When Bush challenged Parker, however, Parker stated, "I don't call myself no chicken, man."[73] Parker stated that the co-defendants went to the victim's convenience store twice, but that they did not rob during the first visit. Parker stated that Bush had said that he planned to kill the clerk when they stopped the first time.[74] Parker also fully described the victim's reactions during her abduction and murder.[75]

Parker was asked during the taking of his first statement whether he would be willing to show the police where the knife used to stab the victim was thrown, and Parker assented (over Greene's objection).[76] On May 7, 1982, two officers drove Parker out to the murder scene, and Parker gave a second statement. It is unclear whether the officers initiated the May 7 contact with Parker.[77] Parker signed a waiver of rights form before leaving with the officers. Parker showed where "they" had taken the victim out of the car and stated that co-defendant Bush stabbed and shot her.[78] He showed

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[73] R2-17-Exh. 5, at 782.

[74] *Id.* at 791 ("[Bush] said that first time he stopped somewhere, he said, 'I'm going to kill her, I'm going in there and I'm going to kill her. I'm going to get her in the car and take her off and I'm going to kill her. You all ain't going to have nothing to do with it,' just like that there.").

[75] *Id.* at 783, 785, 790.

[76] *Id.* at 785.

[77] *Id.* at 795.

[78] *Id.* at 798.

the officers where the knife had been thrown from the car. He indicated where the police had stopped the car after the murder and that the defendants had considered shooting the deputy. He showed where the defendants went to hide the gun and where the defendants split up the money; Parker received between twenty and thirty dollars.[79] Afterwards, he was dropped off at his house. Neither of the officers made any contemporaneous notes of this second statement, and nothing was written down until ten days after the statement.[80] The second statement thus focused almost exclusively on the events after the murder; the second confession contained no details of the events leading up to and during the murder.

The third statement was a confession made to Bush's girlfriend, Georgeanne Williams, who testified that she went to visit Bush on May 8, 1982, at the jail. She said that she was allowed into the cell area alone to speak with Bush and that she thereafter went across the hall to speak with Parker. She claimed that Parker's door was loose and that she could talk to him through the keyhole. Williams testified that she asked Parker who shot the victim, and Parker said, "'I shot [the victim] and [Bush] stabbed her.' And [Parker] said if I [Williams] mentioned it, it would be my word against [Bush's]. He said that [Bush] already had a past record, it would be on him, anyway."[81] This was the entire extent of the third statement. On cross-examination, Williams admitted that she had met Parker only once prior to this confession, that Bush had asked her to marry him, that she visited Bush every day he was in jail, and that she had lied to her parents as to Bush's past record.

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[79] R2-17-Exh. 6, at 803.

[80] *See generally* testimony of Officer Powers, R2-17-Exh. 5, at 794-99, R2-17-Exh. 6, at 801-36; testimony of Officer Vaughn, R2-17-Exh. 6, at 836-48.

[81] Testimony of Georgeanne Williams, R2-17-Exh. 6, at 883.

The other evidence linking Parker to the murder was not great. No weapon with Parker's fingerprints was introduced. One witness identified Parker as being in the store earlier in the evening of the murder.[82] Another witness testified that he saw the four defendants together in Fort Pierce earlier in the year.[83] And one witness testified that he saw Parker's co-defendant Bush (along with unidentified others) in the store at the time of the robbery.[84]

The jury could have convicted Parker of either premeditated murder or felony murder. The jury's verdict did not indicate whether they believed that Parker actually committed the murder or instead whether they believed someone else committed the murder but that Parker had engaged in the commission of the felonies underlying the murder.[85] However, as Parker's original statement only supported a theory of felony murder, we need only determine whether there was sufficient other evidence to support that theory to render admission of that statement harmless.

Parker's second statement to the police, although not as detailed as the first, was essentially a complete confession to participation in the underlying felonies and therefore also supported the state's felony murder theory. In addition, there was testimony from a witness who had seen Parker in the victim's store earlier in the evening, when Parker had apparently cased the store for the eventual robbery. Clearly, there was sufficient evidence to support Parker's conviction under a felony murder theory, even without Parker's original statement. Upon review of the record, we are convinced that

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[82] R2-17-Exh. 4, at 512.

[83] R2-17-Exh. 5, at 615.

[84] R2-17-Exh. 4, at 537.

[85] *See* judge's charge to jury, R2-17-Exh. 7, at 1181-82.

the defendant suffered no prejudice from the admitted evidence. Accordingly, we find that the introduction of Parker's first statement during the guilt phase of his trial was harmless beyond a reasonable doubt.[86]

3. *Sentencing Phase*

We also find that the introduction by the state of Parker's first statement during the sentencing phase was harmless error. Although parts of the statement were damaging to Parker, overall the statement was highly exculpatory. He told of his continual objections to the planned robbery and that he asked to be taken home. He recounted the pressure put upon him by the shooting her or injuring her in any way. The statement showed that Parker was remorseful, upset about what had happened, and wanted everyone to know he had not done it.[87]

Indeed, this statement by Parker, given soon after his arrest and followed by his cooperation with the authorities in going to the scene to look for the weapon and confirming where the body of the victim had been placed, gave his counsel perhaps the strongest ammunition he had to argue against imposition of the death penalty. In our opinion, if the state had not

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[86] *See Miller*, 838 F.2d at 1540 (finding admission of confession harmless as to guilt; "[The defendant's] statement told the jury only what the police already knew or what other witnesses would relate... Furthermore, the police had one piece of evidence that clinched the issue as to Miller's factual guilt...."); *Martin v. Wainwright*, 770 F.2d 918, 933 (11th Cir.1985) (finding admission of confession in violation of *Miranda* harmless error; "The most important factor in our decision is that the [improperly admitted] confession was merely cumulative of the evidence contained in the [properly admitted] confession. In fact, the [properly admitted] confession included a far more detailed description of the murder than did the [improperly admitted] confession." (footnote omitted)), *cert. denied*, 479 U.S. 909, 107 S. Ct. 307, 93 L. Ed. 2d 281 (1986).

[87] R2-17-Exh. 5, at 780-93.

offered the statement in evidence, effective defense counsel would have offered it at sentencing. Under these circumstances, we cannot see that Parker was prejudiced by introduction of his first statement, and find that its introduction at sentencing was harmless beyond a reasonable doubt.[88]

Parker maintains that the state's failure to disclose at his trial its inconsistent "triggerman" theories violated his due process rights and that his trial counsel was ineffective for failing to capitalize upon this inconsistency. Parker claims that the state argued at three of the co-defendants' trials (those of Bush, Cave, and Parker) that that co-defendant pulled the trigger. Parker was the last co-defendant to be tried, and the state did not disclose this potentially exculpatory information to him. Parker argues that this failure to disclose prevented him from presenting evidence that the prosecution itself had doubts as to the identity of the triggerman in this case.

The district court found that, taken as a whole, the prosecutors' arguments in the Bush and Cave cases were meant to convince the jury that the defendants were guilty of first degree felony murder.[89] Parker is nevertheless correct that both the Bush and Cave prosecutors at some point contended that Bush and Cave actually fired the weapon that killed the victim. Bush's prosecutor made the following statement in his closing argument:

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[88] Parker also raises several other issues as to sentencing which we find are without merit.

[89] R3-56-45 ("When read in its entirety, the State's closing argument in the Bush case shows that the State did not have the evidence to prove that Bush was the shooter. Rather, the State throughout reviewed the evidence for the jury explaining that it was sufficient to convict him of felony murder."); *id.* at 48 ("The Court ... finds from the evidence presented at Cave's trial, as well as from the prosecutor's closing argument taken as a whole, that the State was clearly demonstrating at Cave's trial that he should be convicted of first-degree felony murder.").

This is a .38 Special. This is a live round. [This photograph] is what happens when a live round is fired by John Earl Bush and smashes into the skull of Frances Julia Slater.[90]

Cave's prosecutor argued:

The only statement you have that [Cave] didn't pull the trigger was his own self-serving statement, that after he heard Bush's statement implicating him, "I better make the best possible statement now on my own behalf" -- he's the only one at that point that tells you he didn't pull the trigger.

Who had the gun from the beginning? Alphonso Cave. Who had the gun in the store? Alphonso Cave. Who put her in the back seat? Alphonso Cave. Who took her out of the back seat? Alphonso Cave. Who had the gun? And who was outside with Frances Slater? Alphonso Cave.[91]

To support his due process claim, Parker relies heavily on the Supreme Court case of *Green v. Georgia*[92] and on a special concurrence in the en banc case of *Drake v. Kem.*[93] In *Green,* the Georgia courts had refused to admit exculpatory hearsay testimony from a witness who had given the same testimony but instead had appeared for the prosecution in a co-defendant's previous trial. The Supreme Court reversed, holding that the exclusion of the evidence prevented Green's sentencing jury from hearing all relevant mitigating

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[90] R1-4-App. 45, at 992-93

[91] R1-4-App. 46, at 651-52.

[92] 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

[93] 762 F.2d 1449, 1478-79 (11th Cir.1985) (en banc) (Clark, J., specially concurring), *cert. denied*, 478 U.S. 1020, 106 S. Ct. 3333, 92 L. Ed. 2d 738 (1986).

evidence.[94] In *Drake,* two defendants were convicted for the same murder in separate trials. The state had contended at the first defendant's trial that the first defendant had actually killed the victim. The first defendant testified at his trial that he did not participate in the murder and accused the second defendant of being the perpetrator. One year later, the state used the testimony of the first defendant to show that the second defendant had actually killed the victim. The concurrence concludes that the prosecutor had obtained the second conviction through the use of evidence that he could not have believed, given that the prosecutor had disputed the first defendant's testimony in the first trial.[95]

One crucial difference between Parker's case and the facts of *Green* and *Drake* is that Parker's prosecution did not involve the use of necessarily contradictory evidence. In all three cases, there was little physical evidence as to which defendant actually committed the murder. In *Green,* the state court excluded exculpatory evidence that the state had relied upon in a co-defendant's trial. In *Drake,* the reverse held true: inculpatory evidence that the state had discredited in a previous trial was used as essential support for the state's case. But in Parker's case, Parker was not prohibited from making use of exculpatory evidence that had been used to convict his co-defendants; neither did the prosecution use evidence it discredited in Parker's co-defendants' trials to

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[94] *See Green,* 442 U.S. at 97, 99 S. Ct. at 2151 ("The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, and substantial reasons existed to assume its reliability... Perhaps most important, the State considered the testimony sufficiently reliable to use it against [a co-defendant], and to base a sentence of death upon it." (citations and footnote omitted)).

[95] *See Drake,* 762 F.2d at 1479; *see also id.* ("The prosecution's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair.").

show that Parker was the triggerman. Due to the lack of evidence, the only inconsistency was in the state's alternative arguments.

Parker makes the argument that the failure to disclose the inconsistency violated "his due process right to have the jury at his trial take into account -- both in determining his guilt or innocence and in deciding whether to recommend a sentence of death -- that the State had previously contended that someone other than Parker fired the shot that killed Ms. Slater."[96] But no due process violation occurred, because there was no necessary contradiction between the state's positions in the trials of the three co-defendants. Given the uncertainty of the evidence, it was proper for the prosecutors in the other co-defendants' cases to argue alternate theories as to the facts of the murder. The issue of whether the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendants' juries. Moreover, the second circuit has forbidden the evidentiary use of prior jury argument in federal court under similar circumstances.[97] The state's mere failure to disclose the alternate positions it had taken in the trials of the other co-defendants thus did not result in a due process violation. For the same reasons, Parker's trial counsel was not ineffective for failing to discover and make use of the state's inconsistent statements.

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[96] Grey brief, at 12-13.

[97] *See United States v. McKeon*, 738 F.2d 26, 33 (2d Cir.1984) ("We circumscribe the use of prior jury argument. Before permitting such use, the district court must be satisfied that the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial. *Speculations of counsel*, advocacy as to the credibility of witnesses, arguments as to weaknesses in the prosecution's case *or invitations to a jury to draw certain inferences should not be admitted.*" (emphasis added)).

IV.

Parker maintains that he was denied his Sixth Amendment right to confront the witnesses against him when the prosecutor made reference to co-defendant Bush's statement implicating Parker.[98] Over objection, the prosecutor stated during closing argument that Parker gave his statement because "he found out that [Bush] told law enforcement who actually shot Frances Julia Slater."[99] And, "I submit to you that the only reason that ... J.B. Parker called for Sheriff Holt, is because he found out what John Earl Bush told law enforcement regarding the killing."[100]

The district court found that these statements were logical inferences drawn from the evidence, since Parker acknowledged during his first statement that he was giving the statement because "something was being put on" Parker and since Parker stated during his first statement and during cross-examination that Bush had said that "everything would fall on" Parker if he confessed.[101]

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[98] *See, e.g., Douglas v. Alabama*, 380 U.S. 415, 419, 85 S. Ct. 1074, 1077, 13 L. Ed. 2d 934 (1965) ("Petitioner's inability to cross-examine [a non-testifying co-defendant who had been tried separately] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause.").

[99] R2-17-Exh. 7, at 1154.

[100] *Id.* at 1156.

[101] *See* R3-56-58 ("It is logical, under the circumstances here, to infer that the petitioner made his statement to the sheriff because he either knew, or suspected, that one of his codefendants made a statement implicating him in the murder. It is fair to infer that Bush made a statement pointing the finger at one of the other participants in the crime. The Court finds that the statement was within the evidence before the jury." (footnote omitted)).

Parker argues that the information contained in the prosecutor's statements was not in evidence. We disagree. First, Parker contends that the sheriff, not Parker, stated that Parker had been accused of complicity in the victim's murder. Regardless of who made the assertion that Parker had been accused, the fact of the accusation was nevertheless in evidence. Second, Parker points out that his statements concerning Bush's threat to accuse him referred to a statement Bush made prior to their arrest, not to Bush's confession. But we agree with the district court's conclusion that the prosecutor could logically infer from (1) Bush's pre-arrest threat to implicate Parker and (2) Parker's post-arrest knowledge or suspicion that someone had implicated him that (3) Bush had carried out his threat to implicate Parker. The prosecutorial statements were fair comment on the evidence.[102]

Even assuming *arguendo* that a Confrontation Clause violation occurred, the error was harmless beyond a reasonable doubt.[103] As we discussed more fully in part II. of this opinion, the prosecution introduced two valid statements during Parker's trial, one of which implicated Parker as the triggerman. Parker is not due relief on this issue.

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[102] *See United States v. Dady*, 536 F.2d 675, 678 (6th Cir.1976); *cf. Hutchins v. Wainwright*, 715 F.2d 512, 516 (11th Cir.1983) ("The prosecutor clearly went outside the record of this case when he explained to the jury that there was an eyewitness informant who told the police that Hutchins was the perpetrator of the crime."), *cert. denied*, 465 U.S. 1071, 104 S. Ct. 1427, 79 L. Ed. 2d 751 (1984).

[103] *See, e.g., Dutton v. Evans*, 400 U.S. 74, 90, 91 S. Ct. 210, 220, 27 L. Ed. 2d 213 (1970) (Blackmun, J., concurring) ("The single sentence attributed in testimony by [one witness] to [a co-defendant] about Evans, and which has prolonged this litigation, was, in my view and in the light of the entire record, harmless error if it was error at all.").

Parker asserts that the prosecutor violated *Swain v. Alabama*[104] when he struck all four of the black prospective jurors.[105] After the second and third strikes, Parker's trial attorney objected. The prosecutor refused to provide any rationale for his strikes. After the fourth strike, Parker's attorney objected again. This time, the prosecutor stated that he struck the fourth black prospective juror for several reasons:

Number one, I thought she indicated that it would be a hardship for the person that she was caring for. He was an invalid, if she served on the jury. Number two, I determined that she did not like capital punishment, that she was not -- did not qualify as a cause challenge but it would still enable us to exercise peremptory challenge based upon her feelings regarding capital punishment and number three, the third reason after she indicated she understood everything. She, obviously, was undecided according to her answers, even though [defense counsel] was questioning her. So, conditioned upon that, I recommended to [the other prosecutor], that we exercise our peremptory challenge and for that reason and for no other.[106]

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[104] 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965). Because Parker's conviction was final prior to the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the holding in *Batson* does not apply to Parker's case. *See Love v. Jones*, 923 F.2d 816, 818 n. 2 (11th Cir.1991).

[105] The district court did not reach the question of whether this claim was procedurally barred and denied relief on the merits. *See* R3-56-77. On appeal, the state does not challenge Parker's claim as being procedurally barred. Accordingly, we address this issue on the merits. *See, e.g., Mayo v. Lynaugh*, 893 F.2d 683, 687 (5th Cir.1990) (state's failure until petition for rehearing on appeal to present procedural default claim waived procedural default issue).

[106] R2-17-Exh. 4, at 454-55.

The prosecutor later gave a further and more general justification for his strikes:

I have never at any time ever mentioned to anybody, to excuse any juror for any reason, whether race, creed or color when we are trying a case. They ... have separate reasons. We excuse jurors for the way they answer, peremptorily, the way they answer questions, their attitude, their demeanor, many, many things and unfortunately in this case as we said, we have excused nine now. Four of which were black and five were white. And we had just cause for every one of them. Race had nothing to do with it.[107]

The trial court refused to declare a mistrial due to the strikes. Parker was ultimately convicted by an all-white jury of killing a white woman.

This court has held, "Under *Swain,* a prosecutor's use of peremptory challenges to exclude blacks from a jury violates the equal protection clause of the Fourteenth Amendment only where a systematic striking of blacks from the jury can be shown in 'case after case, whatever the circumstance, whatever the crime and whoever the defendant or the victim may be.'"[108] However, Parker has not shown any such systematic pattern of exclusion of black potential jurors by the prosecutor. But if a prosecutor voluntarily places his reasons for peremptory challenges on the record, then those reasons should be reviewed for evidence of discrimination:

Cases where the prosecutor at trial volunteers his or her reasons for using peremptory challenges to exclude from the petit jury an identifiable group, present a situation distinguishable from *Swain.* In such cases, the court does not

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[107] *Id.* at 456-57.

[108] *Love*, 923 F.2d at 818 (citation omitted).

conduct the type of inquiry barred by *Swain*. The prosecutor's motives have been voluntarily put on the record and the prosecutor can no longer be cloaked by the presumption of correctness.[109]

Parker argues that the prosecutor opened the door to an inquiry as to his motives for striking all of the black prospective jurors by (1) providing his reasons for striking one black prospective juror[110] and (2) stating in general terms his possible motives for striking prospective jurors.[111] But generally stating possible motives is not the equivalent of stating particular motives for striking particular minority venirepersons. The prosecutor was not referring only to striking black prospective jurors but rather to the factors weighing into his decision to strike all jurors. A statement of

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[109] *Weathersby v. Morris*, 708 F.2d 1493, 1496 (9th Cir.1983), *cert. denied*, 464 U.S. 1046, 104 S. Ct. 719, 79 L. Ed. 2d 181 (1984); *see also Garrett v. Morris*, 815 F.2d 509, 513 (8th Cir.) ("Even assuming that the prosecutor had no duty to justify his actions under *Swain*, by volunteering his reasons for striking the black jurors, he made those reasons part of the record subject to our review. He is no longer 'cloaked by the presumption of correctness,' and we may review his motives 'to determine whether the "purposes of the peremptory challenge are being perverted."'" (citations omitted)), *cert. denied*, 484 U.S. 898, 108 S. Ct. 233, 98 L. Ed. 2d 191 (1987); *cf. Batson*, 476 U.S. at 101 n. *, 106 S. Ct. at 1725 n. * (White, J., concurring) ("Nor would it have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant."). *See generally Walton v. Caspari*, 916 F.2d 1352, 1361 (8th Cir.1990) ("We hold that *Garrett* 'did not announce a new rule because it was "merely an application of [existing] principles,"' and therefore the district court did not err in holding that *Garrett* could be applied retroactively to Walton's case.") (citations omitted), *cert. denied*, --- U.S. ----, 111 S.Ct. 1337, 113 L.Ed.2d 268 (1991).

[110] *See supra* text accompanying note 115.

[111] *See supra* text accompanying note 116.

general policy such as the one made by the prosecutor in this case does not lift *Swain*'s cloak of presumptive correctness. We will therefore consider Parker's equal protection claim only in reference to the single black prospective juror for whom the prosecutor gave reasons for striking.

The prosecutor gave three reasons for striking the fourth black venireperson. These reasons were that the venireperson (1) needed to care for an invalid; (2) expressed reservations about the death penalty; and (3) expressed confusion in some of her responses. Standing alone, these reasons do not appear to be pretextual. Although Parker argues that white prospective jurors who were not struck also expressed hesitancy as to the death penalty, hesitancy was not the only reason given for the strike of the fourth black prospective juror. Parker does not point us to a hesitant, confused white venireperson confronted with a personal problem in serving as a juror who was not struck. Under the particular facts of this strike, no equal protection violation occurred.[112]

Parker also appears to argue that the Florida courts misapplied state law in rejecting his challenge to the empaneling of the jury. However, Parker does not explain in what way this error, if it took place, raises claims cognizable in federal court.[113]

Finally, Parker argues that the transfer of his case from the Southern District of Florida to the Middle District of Florida

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[112] *Cf. Weathersby*, 708 F.2d at 1496-97 (analyzing prosecutor's volunteered reasons for striking prospective black jurors and finding no equal protection violation).

[113] *See Wainwright v. Goode*, 464 U.S. 78, 86, 104 S. Ct. 378, 383, 78 L. Ed. 2d 187 (1983) (per curiam) ("Mere errors of state law are not the concern of this Court, unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." (citations and internal quotations omitted)).

constituted an abuse of discretion by the transferring judge, the Honorable Stanley Marcus, and that his case should be remanded (if necessary) to the Southern District. Both the Southern and Middle Districts had jurisdiction over the case, because Parker was indicted and formally sentenced in the Southern District and was tried and convicted in the Middle District.[114] Judge Marcus transferred the case to the Middle District because two of Parker's co-defendants had petitions for habeas relief pending in the Middle District, and because at least one of Parker's issues appeared to be similar to those raised by his co-defendants.[115] However, the co-defendants' petitions were heard by different Middle District judges,[116] and at the time of the transfer one of the co-defendants' petitions had already been dismissed.[117]

The question for this court is whether the transfer adhered to the dictates of 28 U.S.C. § 2241(d), which states in pertinent part:

The district court for the district wherein [a habeas corpus] application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

Parker argues that the transfer was not "in furtherance of justice," because many of the witnesses he wished to present

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[114] *See Dobard v. Johnson*, 749 F.2d 1503, 1505 (11th Cir.1985) (construing 28 U.S.C. § 2241(d); "We hold that where substantial incidents of conviction and sentence are divided between two federal judicial districts, either district court is the court of conviction and sentence within the meaning of Sec. 2241(d) and has power to entertain the petition on its merits or transfer it.").

[115] R1-16-5-6.

[116] R4-20.

[117] *Id.* at 8.

would be greatly inconvenienced by travel to the Middle District from the Southern District, where the crime was committed. We agree that district courts should avoid the temptation to transfer habeas petitions without giving careful consideration to the convenience of witnesses.[118] However, the abuse of discretion, if any, is nullified by this court's determination above that no evidentiary hearing was required. And strong considerations of judicial economy dictate that this case be remanded to the Middle District of Florida, the court that is already intimately familiar with Parker's claims.

VII.

Because we find no merit in any of Parker's claims, the district court's judgment is AFFIRMED.

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[118] *See Mitchell v. Henderson*, 432 F.2d 435, 436 (5th Cir.1970) ("The purpose of [section 2241(d)], of course, is to provide a more convenient forum for witnesses.").

APPENDIX D – STATUTE INVOLVED

Title XLVII. Criminal Procedure and Corrections (Refs & Annos)

Chapter 921. Sentence (Refs & Annos)

921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.-- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the

State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and

the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) **Review of judgment and sentence.**--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) **Aggravating circumstances.**--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary;

kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or

because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal street gang member, as defined in s. 874.03.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) Victim impact evidence.--Once the prosecution has provided evidence of the existence of one or

more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) Applicability.--This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.

APPENDIX E – ORDER OF THE SUPREME COURT OF FLORIDA RELINQUISHING JURISDICTION DATED THURSDAY, OCTOBER 17, 2002

SUPREME COURT OF FLORIDA

THURSDAY, OCTOBER 17, 2002

CASE NO.: SC01-172
Lower Tribunal No.: 82-352 CFC

J.B. PARKER vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

The jurisdiction of the above cause is hereby temporarily relinquished to the trial court for a period of 90 days for the specific purpose of the trial court conducting an evidentiary hearing on appellant's motion to suppress filed October 1, 1999, and thereafter issuing an order on the merits of the motion to suppress. At the conclusion of the 90-day period or the rendition of the trial court's order, whichever comes first, the appellant shall file a copy of the trial court's order with this Court. The appellant and appellee shall ensure that the supplemental record resulting from the relinquishment proceeding shall be forwarded to this Court no later than 30 days after the rendition of the trial court's order. Thereafter, the parties shall be permitted to file supplemental briefs limited solely to issues raised regarding the supplemental proceedings regarding the motion to suppress and the trial court's ruling on the motion to suppress. The Court shall issue a supplemental order setting an expedited briefing schedule.

The Court shall defer ruling on the remainder of the issues raised in appellant's brief until after the conclusion of the supplemental proceedings and receipt of the supplemental

record. Counsel for the parties are hereby directed to file Status Reports with this Court every 30 days as to the progress of the relinquishment proceeding.

ANSTEAD, C.J., and SHAW, WELLS, PARIENTE and LEWIS, JJ., concur.

QUINCE and CANTERO, JJ., dissent.

*** THE RECORD RESULTING FROM THE ABOVE RELINQUISHMENT PROCEEDING SHALL REFLECT "SUPPLEMENTAL RECORD - II VOLUME II, ETC." AND PAGE NUMBERING SHOULD START WITH PAGE 14 AND RUN CONSECUTIVELY.**

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

[Seal of Supreme Court of the State of Florida]

tc
Served:

LAWRENCE MIRMAN
DAVID M. LAMOS
MELANIE A. DALE
HON. DWIGHT LUTHER GEIGER, JUDGE
HON. MARSHA STILLER-EWING, CLERK

APPENDIX F—2002 AFFIDAVIT OF DAVID POWERS –IN LIEU OF LIVE TESTIMONY AT EVIDENTIARY HEARING ON MOTION TO SUPPRESS

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR MARTIN COUNTY STATE OF FLORIDA

STATE OF FLORIDA,	)	
vs.	)	**82-352-CF**
J.B. PARKER	)	

2002 Affidavit of David Powers - in lieu of live testimony at evidentiary hearing on motion to suppress

I, **David Powers**, do hereby swear that the following is true:

1. As I previously testified in my 1982 deposition, at page 30, I do not recall who it was that had told me that Parker had contacted someone at the Sheriff's department and indicated that he wished to cooperate in the investigation. I have no personal knowledge as to the basis for that person's belief that Parker wished to cooperate. Other than seeing Mr. Parker upon his initial arrest, I had no contact with him prior to arriving at the Martin County Jail on May 7, 1982 to interview him, as detailed in my report. I previously testified at the 1982 motion to suppress I thought that Captain Crowder was that person. However, Captain Robert Crowder (who is now Sheriff of Martin County) has advised me that he was not that person. Were Sheriff Crowder to testify in this matter, he would state that he was not the person who contacted me on May 7, 1982.

2. The nature of the order I received on May 7, 1982 was such that I believe it came from a person superior to me in the chain of command with regard to criminal

investigations. In 1982 I was a Detective Lieutenant at the Martin County Sheriff's Office. The only two people who were superior to me in the chain of command with regard to investigations were Captain Crowder and Sheriff Holt. Because I now know that Captain Crowder did not give me that command, I now believe that Sheriff Holt did.

3. Sheriff James Holt was a "hands on" Sheriff who was very involved in this extremely high profile murder case. James Holt died on December 21, 1992.

4. As .my previous testimony indicates, when I met with J.B. Parker at the Martin County Jail on May 7th, 1982, I had him sign a rights waiver form. Corporal Steil from the Martin County Jail was present at that time and signed the form as well, acknowledging J.B. Parker's signature. Corporal Steil is now also dead.

Sworn to and subscribed before me this 12th day of December, 2002, by

/s/ David Powers
David Powers

/s/ Linda Cole

Notary Public -- State of Florida

[Notary Seal]

Affiant is Personally Known to me

APPENDIX G – DEPOSITION OF JAMES D. HOLT

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT MARTIN COUNTY, FLORIDA

CASE NO. 82-352

STATE OF FLORIDA

Plaintiff

vs

TERRY WAYNE JOHNSON

Defendant

DEPOSITION OF: JAMES D. HOLT

DATE: July 22, 1982

TIME: 1:30 P.M.

PLACE: Office of Public Defender
Suite 215, Courthouse Annex
Stuart, Florida 33494

TAKEN BY: Defendant

APPEARANCES:

FOR THE STATE:	FOR TERRY WAYNE JOHNSON:
David C. Morgan Assistant State Attorney FOR J.B. PARKER: Robert Makemson Stuart, Florida FOR ALPHONSO CAVE: Karen Steger Stuart, Florida INVESTIGATOR: Joe Yurillo for Karen Steger	Elton Schwarz, Public Defender Robin W. Frierson Assistant Public Defender FOR JOHN EARL BUSH: Lee Muschott Fort Pierce, Florida INVESTIGATORS: Robert Coppock and Karen Goldthwaite for the Public Defender's Officer

* * *

Q. Okay, after the conclusion of this statement, did you have any further contact with Mr. Parker?

A No sir, I don't believe I have had. I think it probably relates in here that he wanted to--to show where the--the knife was thrown from the car but I didn't--I didn't go out with him someone else from the sheriff's office carried him out to the--the scene.

Q Okay. Other than the statement of the other defendants and the statement given by Mr. Parker to you, do you have of your own personal knowledge any other information that would indicate that he was in any extent involved in this crime?

A I'm sorry, I don't--I didn't quite understand it.

Q. Other than the statements of the three other co-defendants--

A. Yes sir.

Q --and the statement that Mr. Parker gave you-

A Yes sir.

Q. --do you have any knowledge of your own as to Mr. Parker's involvement?

A No sir, I don't.

Q Is there anything else in reference to Mr. Parker that I have not asked you that you feel is important?

A I can't think of anything, couselor, off hand that you haven't touched on that comes to my memory.

Q Nothing further.

APPENDIX H – AFFIDAVIT OF J.B. PARKER

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR MARTIN COUNTY STATE OF FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

J.B. PARKER,

JUDGE: Hon. Dwight Geiger
MARTIN CO. CASE NO.: 82-352CF

Defendant.

_____/

AFFIDAVIT OF J. B. PARKER

Defendant J. B. Parker, being duly sworn, states:

1. On May 5, 1982, I made a statement in the presence of Sheriff Holt and others that was taped (the "May 5 Statement"). After the May 5 Statement, I did not initiate or encourage any further contacts with law enforcement officials and did not ask to see or speak to anyone from the Sheriff's office.

2. I did not initiate the contact with Detective David Powers on May 7, 1982, at which time Detective Powers asked me to accompany him on a tour of the crime scenes.

3. When Detective Powers asked me to sign a rights waiver form on May 7, 1982, he did not inform me that the Public Defender, as a result of a conflict of interest, had sought the appointment of other counsel to represent me. At the time I signed that form I had not been informed by anyone that the Public Defender, as a result of a conflict of interest, had determined that his office could not provide representation to me and had asked the Court to appoint other counsel.

_____

J. B. Parker

Sworn to before me this
__ day of December, 2002

_____

Notary Public

Appendix H

State of Florida
Department of Corrections

OATH/VERIFICATION

Under penalties of perjury, I J.B. Parker declare that I have read the foregoing (document) and that the facts stated in it are true.

12-18-02 /s/ J.B. Parker
Date Signature of Declarant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing (document) has been furnished by the U.S. Mail-postage prepaid to: The Fifth Circuit in and for Martin County State of Florida

This 18 day of December, 2002. /s/ J.B. Parker
Signature
Institution and address:

Union Correctional
Institution
7819 N.W. 2286 Street
Raiford, Florida 32026-( )